No. 3385.

In the United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the District Court of the United States for the District of Oregon

CHARLES H. CAREY,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE

Plaintiff in error prosecutes his Writ of Error herein to correct errors occurring on his trial which resulted in his conviction of a charge of violating Section Three of the war statute commonly referred to as the Espionage Act, as amended May 16, 1918. The indictment herein was returned by the Grand Jury on November 2, 1918. It charged plaintiff in error in seven counts with violation of Section Three of the Espionage Act. The first four counts of the indictment were based upon utterances of the plaintiff in error which he was

heckled and provoked into making on October 8, 1918, by officers of the law and others acting with them while he was in a condition of maudlin drunkenness in the smoking room of a Pullman car enroute from San Francisco to Portland, Oregon. The last three counts of the indictment were based upon conversations and discussions which occurred at various times prior to March 1, 1918, between plaintiff in error and one N. F. Titus, and which as the evidence disclosed were not of a character prohibited by the Espionage Act.

Upon the trial the jury returned a verdict of guilty against the plaintiff in error upon Counts 3 and 4 of the indictment, and acquitted him upon the five remaining counts. At the close of the evidence, counsel for plaintiff in error requested the Court to direct the jury to return a verdict of not guilty upon each count of the indictment. Plaintiff in error also interposed a motion in arrest of judgment, which includes among others the contentions urged by plaintiff in error in support of the request for a directed verdict.

Evidence was introduced by the prosecution tending to prove that at the time and place alleged plaintiff in error made the statements charged in the indictment, with the exception of the statement numbered eleven, in each of the first four counts of the indictment. Consequently, for the purposes of the writ herein and the assignment of errors it must be assumed that plaintiff in error uttered

the statements set out in the indictment, at least in substance. Plaintiff in error, however, urges that in view of the circumstances under which the utterances were elicted and made, their nature, the persons in whose presence they were made, the place where they were made, and the condition of the plaintiff in error at the time, the criminal intent essential for conviction of a violation of the statute could not have been present, and the jury could not have properly found such intent to exist to their satisfaction beyond a reasonable doubt. A clear understanding of the contention of the plaintiff in error in the respect mentioned and respecting instructions given and requests for instructions refused requires some reference to the evidence adduced at the trial. (Figures in parentheses refer to pages of the printed transcript.)

The evidence disclosed in substance that plaintiff in error is 53 years of age. He was born at Lingen, a small town on the River Ems in Hanover, Germany. He left the place of his birth in 1891 when he was about 25 years of age, and came directly to Oregon. Plaintiff in error is the third child of a family of six boys and three girls. His two brothers older than he, Herman and Bernard, preceded plaintiff in error to the United States. His younger brothers and his only surviving sister, together with his father, came to the United States soon after he did. His mother died when he was eight years of age. Neither plaintiff in error nor any of his younger brothers ever saw military serv-

ice in Germany. His older brothers, both of whom died some years prior to 1909, were each required to engage for a short time in the German military service before they came to this country. Plaintiff in error went to school in Germany until he was 14 years of age, and afterwards learned something of the milling business—making cereals. He had about Three Hundred Dollars when he came to the United States, and each of his brothers had a like sum of money. (216.) Neither plaintiff in error nor any of the members of his family had any property or interest of any kind in Germany at any time after they emigrated therefrom. After plaintiff in error came to the United States he applied himself for about four years to all sorts of work, including dishwashing, baking, cooking, and janitor work. He was admitted to citizenship in 1900, and had voted regularly ever since, and even before. In 1895, Bernard Albers, Mrs. Schneider, and plaintiff in error started a little feed and cereal mill on Front and Main Streets in Portland, Oregon. They called it the United States Mills. His younger brothers, Will, George and Frank, worked about the mill. Plaintiff in error did the mill work, Mrs. Schneider, the inside work, and his brother Bernard tended the office. (211-214.) The business thus started has developed into the string of mills that the Albers Brothers Milling Company owns, located at Portland, Seattle, Bellingham, San Francisco, Oakland, Los Angeles and Ogden. (214.) The corporation known as the Albers Brothers Mill-

ing Company was organized in 1903. Plaintiff in error was president thereof from its organization until after the incident upon which the indictment against him is based. The members of the Albers family have at all times owned a large majority of the stock of the corporation, plaintiff in error having the largest individual holding of any stockholder in the corporation. (189, 190, 225.)

The hard work and long hours put in by him in developing his business impaired his health, and for the past three or four years he has not been as active as formerly. Virtually all of plaintiff's property holdings consist of his stock in the Milling Company, and the record of all his personal expenditures appears in the Corporation records. (214, 215, 188, 193.) Neither plaintiff in error nor his brothers at any time contributed or subscribed anything to any German interest or project either in connection with the war or otherwise, and no German money of any kind was at any time invested in the mill properties with which plaintiff in error is connected. (188, 193, 215, 216.) The Albers Brothers Milling Company, after the entry of the United States into the war with the active approval of plaintiff in error, subscribed liberally to every issue of Liberty Bonds put out by the United States, altogether $300,000.00, and made substantial contributions to every character of activity conducted in connection with the war; the aggregate of such contributions was $32,332.50; at the same time, a large portion of the dock space of the Albers Broth-

ers Milling Company, visited by plaintiff in error every day, was given up to the storage of Government supplies. (185, 186, 187, 189, 221.)

The Albers Brothers Milling Company has approximately 1000 employees, men and women· about 102 of the men went into the military and naval service, most of them as volunteers, and each received encouragement and approval from plaintiff in error as they called to bid him good-bye. Forty-six or 48 went out of the Portland plant. Eight men went out of the office, all of them volunteers except one, and seven became officers. (183, 184, 224, 225.)

Plaintiff in error instead of obstructing enlistment or encouraging resistance to the United States as charged in the indictment, constantly advised the men in his employ to volunteer and to go as quickly as possible and fight for the United States, and assured them that as soon as they returned they would have their positions back, and if they needed anything while they were gone to let him know and he would help them all he could; in one instance he remonstrated with an employee who claimed exemption from service. (164-7, 171-2, 181, 187, 190-193, 224, 225.)

Notwithstanding the active support given by plaintiff in error and his manufacturing organization to the cause of the United States in the war, false rumors persisted that the American flag was not allowed to float upon or in the Albers Milling

Company plants, that they put ground glass in their flour, sold their Liberty Bonds, and generally were disloyal, to the humiliation of the officers and employees of the concern as well as plaintiff in error. (187, 188.)

Besides actively supporting the cause of the United States, as aforesaid, plaintiff in error was uniformly favorable to the United States; (165, 172, 183, 185, 192, 193, 194, 218.) Shortly before the incident complained of he expressed the opinion that Germany was defeated and that the war would end in the success of the Allies, and that such was the only sucessful termination of the war. (206-211.)

Plaintiff in error is a mild, kind, generous, agreeable man, except when heavily intoxicated. At infrequent intervals he over-indulged in intoxicating liquor and became violent and irresponsible, and upon becoming sober he does not recall what he says or does while drunk. (168-9, 195-6, 201.)

Upon October 7, 1918, plaintiff in error left San Francisco to come to Portland, Oregon, and to his home in Milwaukie, Oregon. He boarded the Southern Pacific train at Oakland, California, at about 10:30 o'clock P. M. At that time he was under the influence of liquor, and immediately went to his berth and retired. The car occupied by him was a combination sleeping and observation car, having a small wash-room about six feet square located between that portion of the car used for observation purposes and that occupied by the berths. This

wash-room was provided with a seat that would accommodate two persons. Plaintiff in error did not leave his berth until about noon on the 8th day of October, 1918, which occasioned some comment among the passengers. When he got up he went to the wash-room where he stayed the remainder of the day, drinking whiskey and holding no conversation or communication with anyone.

LOT Q. SWETLAND, a large property holder of Portland, testified in substance: That he was on the train and riding in the car occupied by plaintiff in error. He thought it was around about four o'clock (October 8th) he saw defendant. At that time he was intoxicated; so intoxicated that he could barely recognize witness. Witness attempted to talk to defendant at that time, and then withdrew, seeing defendant did not know who witness was. About an hour and a half or two hours afterwards, in the wash-room of the composite car, witness again saw defendant. At that time he should say defendant was drunk—intoxicated. Witness saw defendant again after he had dinner that night. Defendant's condition was the same as when witness had seen him before, or even more so. * * * He was in the wash-room, the smoking compartment of that car. Defendant was alone. That was the time defendant asked witness to have a drink. Later on witness saw defendant engaged in conversation in the wash-room. * * He came back and looked into the wash-room again, and

defendant was then asleep. He imagined that was around nine o'clock, between nine and ten he thought. (160-4.)

A man named L. E. Gaumaunt, a Special Deputy Sheriff of King County, Washington, was on the train riding in the same car with plaintiff in error. (100.)

About 6:45 o'clock P. M. on October 8, 1918, Frank B. Tichenor, a Deputy United States Marshal, boarded the train at Grants Pass, Oregon. After having his dinner on the train, Tichenor went to the observation car, where he saw plaintiff in error together with Gaumaunt in the washroom. At the time, plaintiff in error had a bottle of liquor sitting near him, which Tichenor told him to put up. Plaintiff in error paid no attention to the direction of Tichenor, except to mumble incoherently, whereupon Gaumaunt took the bottle and set it upon the floor in the corner of the wash-room. (83, 102, 105, 106.) Tichenor then went out of the wash-room, followed by Gaumaunt, where they had conversation to the effect that plaintiff in error was a pro-German. (83, 102.)

Tichenor then directed Gaumaunt, together with another passenger upon the train named Mead, to go in and find out what the plaintiff in error would say and try to find out who he was, and remember anything that was said. (83, 102.)

About this time the porter on the observation car, Richard K. Clark, realizing that plaintiff in

error had been drinking liquor all afternoon and evening and was very drunk, and that Tichenor, Gaumaunt and the others had surrounded him for unfriendly purposes, went into the wash-room and tried to get plaintiff in error to go to bed.

RICHARD K. CLARK testified in substance: That he saw Henry Albers at the Oakland pier at ten P. M. on the 7th of October, 1918. In his opinion defendant was about half drunk. About 11:30 defendant went to bed, and he did not see anything more of him until the next morning. * * Defendant got up about ten o'clock the next morning, he thought, about ten. From then on he was continually drinking whiskey. He saw those fellows getting around him after they left Grants Pass about 7:30 or 8:00 o'clock, somewhere around there, the night of October 8, 1918. Mr. Tichenor—Gaumaunt was the moving spirit in surrounding Henry Albers at that time. Gaumaunt was the leading one of the two. Mr. Albers had been drinking pretty heavy all day, and that evening after these men surrounded him witness knew the condition defendant was in and wanted to take his whiskey away from him; and so about nine o'clock went and tried to get Mr. Albers to go to bed, and he took his grip from the wash-room to his berth, and after this this man Gaumaunt came and said he wanted that grip. He said, "I want that grip." He says "There is something in it I want to get out of it." Witness said, "What do you want with

it?" He says, "Something in it I want to get out; something in there I want," and witness said, "What authority have you to want this man's grip?" He says, "Well, I am an officer." Witness said, "Well, you will have to show me if you are an officer," so in the meantime the Pullman conductor came along and witness says to the conductor, "How about this man; he claims he is an officer and wants this man's grip; what shall I do about it?" The conductor said, "Well, let him have the grip." In the meantime Gaumaunt showed witness some kind of a little badge. Witness didn't know what it said on it. Gaumaunt said that was his authority, he was an officer. He showed witness some kind of a badge. Gaumaunt didn't say anything at that time except that he wanted the grip, there was something in it. Later he said the only way to get a German to talk was to get him full, get him full of whiskey. When defendant went to bed he was stupified from drink. Witness put him to bed. After he got him down to the berth the brakeman helped him. Defendant wasn't able to take his clothes off when they put him to bed that night; he slept in his clothes. * * * He wasn't able to take his shoes off; slept in his shoes. Witness saw Mr. Tichenor making notes when he went and put defendant to bed. * * after he put defendant to bed, and after they had taken his grip back. He saw Tichenor making notes. He was making notes then, yes, sir,

writing it down. There was two or three of them with him, this man Mead and Gaumaunt and Mr. Kinney. Witness thought there was another man—three or four of them. Mr. Tichenor was writing it down and they were all around him. Witness thought they were giving the information and the writing was done by Mr. Tichenor. When these conversations were going on Tichenor was in a little hall right by the smoking-room listening. He was listening and peeping, peeping and listening, yes, sir. (174-180.)

At the direction of Tichenor, Gaumaunt and Mead together with Kinney and Bendixen, hereinafter mentioned, provoked and heckled plaintiff in error while drunk and irresponsible into making certain statements which constitute the basis of the first four counts of the indictment. The versions of the persons mentioned of the incident follow:

JUDSON A. MEAD: First saw Albers along near noon, October 8th. Did not see him again until evening. The first time he saw Mr. Albers in the smoker there was no one in there except this L. E. Gaumaunt. It might have been a little after eight o'clock. He thought Mr. Gaumaunt and Mr. Albers were engaged in conversation—knew they were in fact. * * When he went in there Mr. Gaumaunt and Mr. Albers were some little time—for some minutes, perhaps ten or fifteen minutes, didn't know exactly. The talk was all commonplace. Witness had been

talking to Gaumaunt previously during the day. He paid no particular attention, although he entered into some of the conversation, that is, in commonplace remarks. He didn't sit down in the smoking compartment; he was standing there. Mr. Albers was sitting down, and this Gaumaunt was half sitting down and half standing up, leaning back against something. * * * Every few minutes Mr. Albers made some remarks when there was nobody else talking. He says, "Well, I am a German and don't deny it; they will never lick the Kaiser, not in a thousand years; once a German always a German." * * * Something was said, some remark made he thought by this Gaumaunt, something concerning the war, and that was the time that Mr. Albers made these remarks. After he made these remarks he swung his arms—throwed his arm back some way, made some gesture with his arm, and started some kind of a recitation which witness thought was in German. As witness remembered it, he was using the words "sprechen," "Rhine," and "offen," and as he understood that sprechen meant speech for German he thought it was in German what he said. Didn't know. Didn't understand it, however, whatever it was. Don't speak German himself. That was all he heard just then. He got up and walked out of there. This man Gaumaunt introduced him to this man Tichenor at this time just outside of the smoking room. He did not remember

that he had seen Tichenor before that time on the train. Gaumaunt went outside at the same time he did, went there and introduced him to this man Tichenor. Then witness made notes of these remarks that Albers had made in his presence. Soon after, he went back into the smoker to see if he was going to make any more remarks of the same kind. He made notes of what he had heard in there, because Mr. Tichenor suggested that he might be called as a witness on that account. Tichenor suggested that he make notes of what he saw or heard, and he did so. Went out very soon after the remarks were made and put them down. Didn't think there was anyone in the smoking compartment when he went back, was not sure. Soon after he went in, someone else came in, but he did not remember who that was. He and Mr. Albers talked very little after he went back into the smoking compartment. There were a few commonplace remarks that he did not remember. Albers looked at him and says, "Do you play the game?" Witness said, "I play the oil game pretty strong." Albers then asked witness the second time if he played the game. Witness replied, "Nothing much but the oil game." Albers said, "You don't know what I mean; you are a damn fool." * * * He might have been there more than half, possibly an hour altogether, from the first to the last; but this conversation when he called him a damn fool was within a very few

minutes after he had engaged in conversation with him. * * Though he (Albers) was in possession of all his faculties, as a matter of fact he had been drinking considerably between the time of those first remarks and these latter remarks. From the first to the last he supposed defendant had had probably four or five drinks; didn't think Gaumaunt drank with him all the time, but was certain that he saw Gaumaunt drink at least twice. Took a drink with him once himself, one only. (67-81.)

FRANK B. TICHENOR: He went into the observation car and there wasn't any seats, some were standing, so he left his grip there and went into the smoking compartment and on into the lavatory. Didn't notice who was in there at the time. When he came out was when he first met defendant, but didn't know who he was until some time after that. Had never met him before. Defendant was seated in the smoking compartment. Wasn't doing anything at the time. Man was standing up. Afterwards found out it was Mr. Gaumaunt or Gaymant; didn't know how you pronounce it. Yes, had a conversation at that time with Mr. Albers. There was a bottle, a pint bottle, supposed to be liquor, setting near him, and he asked him where the cork was and to put it away. Didn't remember whether defendant answered him or not, but Mr. Gaumaunt took and set it down in the corner. Didn't know who Albers was at the time

and had never met any of the other witnesses. He then went out of the smoking compartment, went out into the hall. Shortly Mr. Gaumaunt came out to him and wanted to know if he was an officer, and he told him he was, and Gaumaunt told him there was a bad pro-German—some words to that effect—in there and that there was a man who was going to clean him. Witness had better take care of him, and witness told Gaumaunt to go get this party and bring him to witness. They had a little conversation about it. Gaumaunt brought Mr. Mead. Witness told them they could not get anywhere by going in and beating the man up and for them to go in and find out what he said and try to find out who he was, and to remember anything that was said. * * * He heard defendant say at one time—that is when Mr. Mead was in there, "Once a German always a German." Witness was standing by the corner on the outside later on—he didn't just remember who was in there at the time, but when some of the others were in there—Mr. Mead wasn't in at that time, when he said, "What right has this Government to tell me what to do." That is all witness heard. The next morning he phoned the United States Attorney's office and reported what was said and who the party was and all about it, and that he would be in that night. Phoned from Roseburg. When he last saw Mr. Albers he was seated in there. Witness saw defendant when

witness was in the compartment and when witness looked in there two or three times. Kind of looked through the curtain, but didn't pay much more attention. He left it to these other parties, because he could not go in and he could not stand there very long in this hallway because people were passing in and out and he would have to step back and it was crowding the passageway. * * He didn't see the man drinking, but he would judge the man had been drinking. He wasn't lying down, he was sitting up and witness could not tell, just only he would judge the man had been drinking, but he cannot say whether there was anything to indicate that defendant did not have command of his faculties and was not in control of himself. He spoke very distinctly. There wasn't any mumbling * * Gaumaunt told him that he was a Special Deputy Sheriff or something in King County, Washington. Gaumaunt came right out and asked him if he was an officer, and he told him who he was. * * Witness then asked Gaumaunt to go find this man that he referred to that was going to clean up Mr. Albers, as he was very angry about the remarks. These things happened before he ever got into the car and he told Gaumaunt to bring him to witness. He brought Mr. Mead. Then he told Mr. Mead that he could not get anywhere by going in there and beating up a man, for him to go in there and find out who it was and try to find out what

the man was saying and remember what he said, and had him put it down in his note book, anything that was said, so he could remember. Never heard that Mr. Albers had called Mr. Mead a damn fool. Mr. Mead and Mr. Gaumaunt went in there pursuant to that arrangement. Mr. Kinney was also brought to him. Didn't remember whether it was Mr. Gaumaunt who brought him or not, but some one brought him to him at the writing desk in the observation car. Mead and Gaumaunt had been in before that. Didn't know how long that was before he got connected up with Kinney. He knew Mr. Mead was in there when the first remark was made. When the last remark was made he was outside, he remembered, and someone else was in there. Didn't remember which one of them was in there at that time. It wasn't Gaumaunt that was in there. Gaumaunt did not stay there all the time. Yes, they brought him another man. Thought Mr. Gaumaunt brought him Mr. Bendixen. After quite a little persuasion Mr. Bendixen said that his—before that, why Mr. Kinney had told him that the party was Mr. Albers, then Mr. Bendixen was brought to him and he asked him to go in there and he said that he didn't like to go in. It placed him in a very embarassing position, that he had an uncle who was a stockholder in the Albers Company, and witness told Bendixen that he was a pretty poor American citizen to refuse to go in

there to find out anything that he could in this case, and then he consented and went in. Yes, Bendixen told him he was able to speak German. That wasn't exactly the reason for having him in there. He wanted more than two witnesses for the case. * * He understood the conversation was carried on in German after Bendixen went in there. Didn't hear it. He was back there at the desk, taking notes. (81-89.)

L. W. KINNEY: Didn't remember whether he went in there immediately after dinner; it was soon after. Did not have any conversation with him. Fifteen or twenty minutes later witness again went in, saw Mr. Albers there, Gaumaunt was with him, no one else. Went in there, sat down, and began talking to him. One of defendant's remarks was, "Once a German, always a German." They were asking him about the war when he made that remark. Another remark he made was "I served twenty-five years under the Kaiser." Witness said to him, "Do you mean to say you served twenty-five years under the Kaiser?" He then said, "Yes, I served twenty-five years under the Kaiser when I came to this country." He said, "All that I have got in this country since I came to this country—what do I get in this country? I get shit, shit, shit." He pounded his left hand on his knee. The defendant said that "if necessary, he could take a gun and fight right here," and still used his left hand on his knee. He also said that we

would have a revolution in between two to four years. At first he said two years, and witness checked him up on it, and he said, "No, not with in two years, but within two to four years." He also said, "Why should this country tell me what to do?" He also said, "They can't get me." He said that "he came to this country without anything, and that he would go away without anything if necessary." Witness made notes that night on the train. He went in and came out several times during these conversations with Mr. Albers. Made some notes in between. * * Yes, heard Mr. Albers say, "They can never lick the Kaiser in a thousand years; I can take a gun and fight right here if necessary, if I have to." Did not recall anything else. The things detailed did not all occur at one time. Conversation extended over approximately three-quarters of an hour, but Mr. Gaumaunt was there most of the time. There were others in and out, but didn't pay much attention to them, didn't know what part they heard. * * He engaged in conversation with Mr. Albers himself in regard to this war. It was a general conversation. He did not know what was said by him with reference to any of these statements that he claimed to have heard. Witness asked defendant how long he thought this war would last, and then things that he thought might interest defendant and himself. * * * Never remember seeing Mr. Bendixen until the first time

up to the Court buildings at the grand jury examination. Didn't talk to Mr. Mead. Mr. Albers' manner of uttering the language was comparatively clear; he had a cigar in his mouth a great deal, and there were some things that witness could not understand which he would like to know. He most centainly should think defendant had possession of his faculties and seemed to know what he was saying and doing. * * * Didn't talk to defendant about other matters besides the war, not that he remembered of. * * * Witness went in there and engaged in conversation with him; asked him about the finish of the war and what he thought that the Kaiser could do and what he was going to do, etc. No, sir, he didn't note down what was said to defendant. Yes, sir, noted down very carefully what defendant said to him because he had a right to, because witness was protecting the United States Government. Witness was a United States citizen and was looking for what he might hear in regard to disadvantage to the United States government. Any propagandist is unreasonable. By propagandist he meant a party who is doing work against the government in this country. After hearing those utterances he thought defendant was doing work against the government. * * * Witness certainly did act deliberately, with very great deliberation. * * * He had been in twice before, and defendant had said nothing to him. Most any

time he would engage a man in conversation for that matter for the United States government. He was not in the habit of associating with people under the influence of liquor unless he really had business. Before that he gave defendant no chance to say anything to him. Defendant did not say anything to him. After he had overheard this conversation he went down there and engaged defendant in talk, and it was after he had engaged defendant in talk that defendant said these things. * * * After it started he and Mr. Gaumaunt and Mr. Tichenor and Mr. Bendixen were getting together there that night in concert on this propagandist. * * * He spent that three-quarters on an hour to an hour and got what evidence he thought he needed and went to bed because he was sick all that day. * * * So far as he was concerned, the starting point was when he went in there himself, when he went in there to find out what he could hear. He had heard some people say there was a propagandist in there, and immediately went in. He overheard a conversation which was not addressed to him—he could not say between whom that conversation was—but after he heard it that became the starting point with him. He went into the car and had this conversation with defendant. After that he went out several times and put his notes down and went back again. He put his notes down of his own motion right away. The gentleman that he

talked with when he came out was Mr. Tichenor, after he came out of this room. Someone told him that he was an official of the Government, and he talked it over with him. Really could not say whether it was Gaumaunt told him Tichenor was an official; thought possibly it was Mr. Gaumaunt. Tichenor told him to get more evidence. Then he went back again, * * * and Tichenor remained on the outside. When Tichenor told him to go back, he went back. He should have gone back anyway. After he came out the second time he jotted down a lot more, and went back again and got some more in the third drive. Thought he jotted that down, if he remembered correctly. Didn't remember whether in the presence of Tichenor or away from Tichenor. Didn't think Tichenor told him to go back the second time. Can't remember that Tichenor told him to go back the third time. Didn't know why he should have known that if defendant had been in his right mind his going back three times would have put him on his guard, supposing that he had been the most arrant knave in the world, or propagandist, as he termed it. Didn't know why his repeated visits to defendant at that time would have told defendant there was something on there. No, he did not know that it was a fact that defendant was so drunk and the witness knew he was so drunk that defendant could not recognize him between the first and the second and third visits (89-99).

L. E. GAUMAUNT: When he first went in he noticed Mr. Albers and a man who he later learned was Mr. Bendixen. * * * He came in and took a smoke, and went into the toilet, and then came back out. Heard nothing particular that he can remember now. Went back the second time pretty close to eight o'clock to smoke. * * * Mr. Kinney was in there; he would not say he was sitting with Mr. Albers, though. He heard Mr. Albers make that remark about McAdoo, McAdoo being a son-of-a-bitch. Defendant didn't seem to be addressing anybody in particular. That was the only remark he heard him make. Defendant had been drinking. He believed there was a bottle there on the seat. Albers was sitting down. Defendant's speech about McAdoo was plain. Yes, sir, he heard it plainly. After that remark was made, he didn't participate in any conversation outside of asking Mr. Kinney who the man was, and didn't he think defendant had better be put to bed. This was right after he made this remark. Witness said this right in the room with Mr. Albers. Nothing else took place, except Mr. Kinney said he didn't believe in putting a propagandist to bed, or something to that effect; and witness asked Mr. Kinney if he knew who the man was, and he said he didn't. After that a gentleman by the name of Mr. Mead, he believed, that heard part of the conversation, that came in there and was going to whip de-

fendant, or something to that effect, and then Mr. Tichenor came inside to go to the toilet. He didn't know who Mr. Tichenor was at the time, but later found out it was Mr. Tichenor. Mr. Tichenor came in to go to the toilet, and when he came out he saw this bottle there and he said to Mr. Albers: "Put the cork in that bottle and put it away." Mr. Albers mumbled something; he didn't get what it was. Nevertheless, he didn't put the bottle away, and to avoid further trouble witness took the bottle down and put it away, put the bottle out of sight. Mr. Mead was getting very hot under the collar, and witness judged by that Mr. Tichenor was an officer, telling him to put the bottle away, and he followed out and asked him if he was an officer, and he said he was a Deputy United States Marshal, so witness told Mr. Tichenor what was going on in there. Witness said, "That old gentleman is going to be hurt; I think if you are an officer you had better take care of him," and Tichenor said, "Well, there is a better way of doing it," or something to that effect. And he, Tichenor, asked them to make notes of what was said, which they did. Witness returned to the smoking car then. Right at the time he thought there were two people in there when he returned. Defendant was talking about him being a German, "Once a German always a German." He also said, "I am a German and I don't deny it, and I am pro-Hun and my

brothers are pro-Hun." Well, he says he came to this country twenty-five years ago—twenty or twenty-five years ago— and thought that conditions in Germany were better than what they were in this country. He thought that this country wasn't as free as Germany. Witness didn't think defendant said anything about the Kaiser. He said something about him not serving in the German army. Defendant said that the United States could never lick Germany in a thousand years. Witness didn't write any notes of what he heard; no, sir, but brought them out and told Mr. Tichenor. Mr. Tichenor made the notes. Defendant said there would be a revolution in this country in ten years, maybe in two years, and maybe tomorrow. He said that a Yankee could never beat a German; the Yankees could never beat the Germans in a thousand years, something to that effect. Mr. Tichenor told him to report to the District Attorney, which he did. * * * He should say he went in and out of the smoking room during the time that he heard these statements he has related five or six times; seven times. Each time he came out and told Mr. Tichenor, so he could make notes of what was said. One time Mr. Tichenor was outside the curtain in the hall. The other times he was outside by the desk in the observation car. Yes, sir, Mr. Albers expressed himself vigorously. He pounded his knee (illustrating with his hands). Witness

didn't believe they asked him any questions outside the witness asked him to go to bed and the defendant told him to go to hell. That was about the only question he asked defendant that he could recall. * * * He didn't hear anything of the conversation between Mr. Bendixen and Mr. Albers at a quarter to eight o'clock. Went back the second time to smoke. Didn't believe defendant was talking to anybody that he could recollect when witness went there the next time. Had not drunk with him at that time. Later on in the evening took two drinks with defendant. At eight o'clock when he was in there nobody was talking to defendant. Witness did not engage in conversation with him. Mr. Tichenor came in about 8:05, or something like that. Didn't believe anybody was talking with defendant at that time. Witness was in sight of defendant. Defendant had his booze in sight when witness was talking with him. Mr. Tichenor went to the toilet and came out and lighted up a cigar, as near as he can remember, and Mr. Albers was mumbling something to himself. He didn't believe anybody knew what it was at that time, and Mr. Tichenor told him he would better put the bottle away, which he didn't do. The witness thought to avoid further trouble he would put it away. Defendant did not make any remark when Mr. Tichenor told him to put it away, not right there. He did when Mr. Tichenor went out. He said he knew that big son-

of-a—meaning bitch—was going to get him, or something to that effect. Witness sat there for a second and Mr. Kinney, he believed, was in there with him and Mr. Mead, and Mr. Albers made the remark about McAdoo, and Mr. Mead started to get hot under the collar and witness said to Mr. Kinney, "Mr. Kinney, we better get that old gentleman to bed." Witness figured he might be some labor man or someone else. Didn't know who he was. If they could avoid trouble by throwing him into bed, wanted to get him into bed and out of harm's way. Defendant wasn't sober; he had been drinking. He seemed to know what he was saying. He sat up straight. Witness had drunk lots but tried to keep people from knowing it. At that time he thought defendant was so that he knew what he was doing. Witness asked him—he believed he asked him himself to go to bed—and defendant told him to go to hell, or something to that effect. Witness showed defendant his star, didn't show everybody on the train his star. Told Mr. Tichenor what Mr. Albers had said about McAdoo being a son-of-a-B. Tichenor didn't say he knew who defendant was. Didn't tell Judge McGinn that he went down and said to Tichenor, "Do you know who that man is?" and Tichenor said, "Yes, I know who it is; it is Albers, and we have been watching him for two years." There is only one thing he heard them say, defendant had been under surveillance for

a year and a half. He believed that was Kinney. He wrote a letter to George Albers, brother of defendant, and tried to give it to the lady next door, but she would not accept it; left it at Mr. Albers' house, as follows:

November 12, 1918.

Mr. G. ALBERS:

This is something I don't like to do, but I can't help it; ever since I got mixed up in your brother's case, why I am losing most of my friends down here; I have been upholding him in all respects whenever I was asked about him; my wife also is against me and says if he is saved, why she will leave me; now if she wants to she is welcome to go tomorrow and the rest can go somewhere else. What I want to ask you is this, will your brother look after me after the matter is finished? I have a good job here and I am making big money. If he is saved, why I lose everything, which I cannot afford as I have nothing now only property which belongs to my wife. I am willing to sacrifice it all to save him if he will take care of me after it is all finished, which would be fine on his part. You asked me about when the case is coming up. I didn't think I should tell you, but I see your interest is in the business. Mr. Heeny, District Attorney, told me it would be either the 24th of this month or ten days later. Our chances are very good, I think. I told Mr. Heeny lots in my letter which the jury did not

ask me, and I think he has another viewpoint of the case. I am going to stay with him if they put me in jail; would like to see you, but figure it better not to.

Kindly burn this up as it means a lot to me at this time. Kindly let me know your view of this matter. Mr. McGinn told me everything would be O. K. when I told him I would have to leave Kent, so I thought I would ask you. I am a special deputy here, otherwise I would have been licked I guess.

Hoping everything will be O. K., I remain,

L. E. GAUMAUNT.

Excuse pencil as I am in a hurry and going to Seattle on business and thought it would be a good chance to bring this to your house myself.

He wrote the following letter to the United States Attorney:

Kent, Wash., Nov. 6, 1918.

My dear Mr. Heeney:

I have been very much worried since I came back from Portland in regards to the Albers case. I answered the questions asked me correctly, but there was other things happened which I was not asked, and I have been afraid that his attorney might ask of these happenings and I am not posted as to what I should do. You said you wanted Mr. Albers to have a fair trial and also the Government, and that has

also worried me. I will now tell you of some of things that happened. Not that I want to try and save him, but save myself from any further troubles. After I heard him make the remarks about McAdoo, I told him that he better keep his mouth shut and I told him I was an officer from the State of Washington, and he would get himself in trouble. Now Mr. Heeney, don't you think he must have been pretty drunk, otherwise he would have shut his mouth? The jury asked me how drunk he was, and I think it was my place to have told them then, but Mr. Tichenor told me to answer only what I was asked. Now I am asking you to advise me. Mr. Bendixen was talking to him in the early part of the evening, and never made any remarks to anyone in regards to Albers, although he knows Tichnor, I believe. So I went in the wash room and sat down and then the party began; it was late in the eve when I went to look for the fellow who was **who was** with him who later proved to be Bendixen. I don't know whether there is any personal feelings between Bendixen or Albers, only Bendixen said he had an uncle in the firm. I also heard some people say when I was at the hotel that Tichnor said if Albers was not found guilty he would throw his star in the lake and jump in after him, but I did not let them people know who I was. These are the things I think you should know, now that I care for Albers in the least, and if he found guilty

ask me, and I think he has another viewpoint of the case. I am going to stay with him if they put me in jail; would like to see you, but figure it better not to.

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it is due to you good judgment, and I think your the man to know it all. If these things I said will in any way interfere with what I said, why let me know, as I don't want to make a mess out of this. You said to tell the truth, which I am doing. But the jury did not ask me about this, so I said nothing, but since that time I have worried about these things and now I feel some better. If at any time you should want to let me know about this, why this is my address. If you don't remember me by name, you will remember me by the white sweater, as you called it.

L. E. GAUMAUNT,
c-o Ford Agency, Kent. Wash.

Kindly advise me as to what I should do in regards to this matter (100-115).

Not content with the utterances that Gaumaunt, Mead and Kinney were able to provoke from plaintiff in error in his irresponsible condition, Tichenor and Gaumaunt sought Bendixen who was able to speak German, and Tichenor peremptorily directed Bendixen to endeavor to obtain from plaintiff in error further statements to his injury by conversing with him in German. Gaumaunt, Mead, Kinney and Tichenor did not speak or understand the German language. Bendixen after slight protest obeyed Tichenor's direction. Counsel for plaintiff in error objected to the introduction of the testimony of Bendixen upon the ground that the indictment charged that the utterances attributed to

plaintiff in error were in the English language, and that proof that they were made in the German language was not admissible to establish the Government's case, which objection was overruled by the Court (121-124). Bendixen testified in substance:

> Got on the train at Grants Pass for the purpose of going to Roseburg, where he had some business to attend to. * * * When that train came it, the first thing he was forced to do was to go into the lavoratory, and as he came out this man, he didn't know who he was at the time, was sitting there, but that was the first time he saw him. Nobody at all was with him. He noticed by the smell of the room that defendant had had liquor, and he warned him as to having liquor in his possession, because he knew the United States—this man Tichenor, was on the train, because he got on the train at Grants Pass. * * * Yes, sir, he told Mr. Albers there was a Deputy United States Marshal on the train, and he told him if he had any liquor in his possession it would be a wise thing for him to get rid of it. Defendant looked up and says, "No, they won't pinch me." Witness said, "They are liable to, and I think you had better take precautions," and defendant turned around to him and said, "Oh, to hell with him," and went down in his grip and pulled out a pint bottle of whiskey and offered witness a drink. He didn't have any further conversation with de-

fendant at that time. He left the compartment or smoking room then. Later, fifteen or twenty minutes or so, he could not say as to the exact time, as they were talking (witness and a friend) a gentleman came up and asked his friend if he was the gentleman that had been talking to this man in the smoking car, and his friend said, "No." Then he asked witness, and witness said, "Yes, I have been talking to him," and so he said, "Mr. Tichenor would like to see you up here, he said he would like to talk to you." Witness said, "All right," and so he went up and then he met Mr. Tichenor the first time ever he had met him in his life. He was introduced to him. Mr. Tichenor then spoke to witness and said,—he asked me if this man had made any remarks, had made any seditious remark, and witness said, "No, not to me," and Mr. Tichenor says, "Do you know the man," and witness said, "No, I don't know who he is," and Mr. Tichenor said, "I will tell you, he has been making some very seditious remarks, and we think he is Mr. Albers, Henry Albers of Portland," and when he said that why witness said, "Is that so," and they spoke of the matter just casual, and so Mr. Tichenor said, "I would like to have you go in there and find out if he really is Henry Albers." Witness hesitated first because he told Mr. Tichenor, "That puts me in a very funny position, Mr. Tichenor; I have an uncle who is interested in that company of

which he is president." Witness kind of hesitated, and Tichenor reminded him that it was his American duty to go in there, and witness did not delay a moment after that, and he went right into the compartment there. When he was in the compartment before he didn't take any drink with Mr. Albers, and when he talked with Mr. Tichenor he had an understanding that if he went in there the chances were defendant would offer him a drink, and he didn't want that brought up against him if he should take a drink. He was very specific on that. Then he went in to Mr. Albers. * * * He introduced himself in German to him because he can carry on a conversation in German and he understood German. He had some conversation with defendant. Witness introduced himself and told defendant who he was, and told him he was Erwin Bendixen, and his uncle was Peter Bendixen, and defendant probably knew him. Defendant told witness that he did. He thought this Gaumaunt offered them a drink. That is the way it was. Then witness told defendant right out kind in a protective way—he said, "Henry, you have been making some serious remarks to these fellows around here." He said. "They are remarks that are going to go hard with you." Defendant turned around in a very emphatic way, and he said to witness, disregarding his warning and everything, he said, "Once a German always a German." He talked

to defendant in German entirely. When defendant talked to witness he said it in German to witness. He said, "Einer Deutsch immer Deutsch; Ich bien Deutsch im Herz." That is the way he put it to witness. Defendant made a remark about being an American, as he would say, on the outside. He said he was an American outside, but he said in his heart he was German. He gave witness this impression. That is the impression he wanted witness to have by the words he used. After witness had introduced himself, the first thing he did was to warn defendant. He told defendant that he had been making some very seditious remarks to these men that were there, and witness said, "It would go hard with you after making these remarks; are you sure you know what you are saying; are you sure you know what you are doing?" and defendant made the remark, he said he was German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you might say, and he wanted to imply—this was in German—and he told witness that on the outside, to the outside world, why he was an American, but down in his heart he was a German, and when he made that remark witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that?" He said, "You don't mean to say you would go to Germany and fight for the Kai-

ser?" Witness made that remark to him and defendant got up and said he would go back in the morning. He says he had served the Kaiser twenty-five years, and with America, shit, shit. That is just what he said to witness in German. Witness knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defendant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to lick America. Then also in this conversation he made the remark, which is a very bad remark in the German language, it was the remark "Schlach America." "Schlach America" in the German language, he takes the word "schlach" means to obliterate. It means to do anything to you against the country. When a man says "schlach" in German he means "schlach" you, he is going to get you. This is witness' translation and that is the way it appears to him. Then after he saw defendant was of that character and he didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said and Mr. Tichenor said, "Well, he has been saying that to all these men," and Mr. Tichenor said, "There must be some more to this." Defendant has been down in San

Francisco and he must have been conspiring down there, making a contract or something. Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing down in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things and then asked defendant if he had had anything like that to do—had done anything like that, and he said no, he hadn't had anything to do like that. He said—he looked at witness, you know, out of the corner of his eye, like this, "Nein, nein." You understand that means, "No, no," and he would not talk any more. During his talk with defendant before that, there were one or two things that probably should be brought up in this case, in regard to that. After witness had introduced himself to him—why, he introduced himself in German, and defendant told him that in German, "Du bist ein ecte Deutscher,' or "You are a genuine German." Also during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun, he said German. He said they were German. He also told witness of some trouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, tomorrow, he said. After he told witness this "Nein, nein," or "No, no," then

defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter that he wanted to go to bed. Then witness went to the rear of the observation car again. When he spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen," that means, "We have won the war." He expressed himself that he was willing to go back, he was going back in the morning. He told witness he had ten million dollars and that he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour later. He reported to Mr. Tichenor what he had heard in that room and made a memorandum of it himself. * * He had one or two drinks with him, yes. He did not make any arrangements to drink with him before he went in there. He said naturally Mr. Albers would ask him to have a drink, and he wanted to know Mr. Tichenor didn't get him in wrong because he took a drink. That is what he told Mr. Tichenor. Mr. Tichenor told him it didn't make any difference to him. * * He went in there because when this man Gaumaunt came to him he showed him, showed them a Deputy Marshal's badge, and when witness went to Mr. Tichenor, why, he was among detectives, and he thought this was a kind of detective game and he made up his mind right then and there that probably these detectives, who are very zealous sometimes, were trying to put something over on

this man, and he went in there in that light and he even talked German to him to hear what he had to say to be sure he gave him a square deal on the thing (116-130).

None of the men thus engaged in baiting plaintiff in error was subject to military service, except remotely and none of them had ever offered himself for such service. Gaumaunt, Mead and Bendixen had all secured classification giving them the exemption from service allowed married men with dependents, Tichenor was an officer of the law, and Kinney was beyond the draft age (77, 81, 92, 100. 116, 250).

Defendant took the witness stand in his own behalf and denied any recollection of making any of the statements attributed to him by the witnesses, or seeing or talking to any of them. He testified that he never had to his knowledge made any statement or committed any act hostile or antagonistic to the United States, and protested his loyalty and attachment to the United States (217, 218, 223, 240, 243).

On the trial the Government was permitted over objection to introduce evidence of irrelevant, improbable and remote statements alleged to have been made by plaintiff in error in 1914 and 1915. These alleged statements were grossly prejudicial to plaintiff in error. They were offered for the avowed purpose of showing intent, whereas it was impossible for the requisite intent to be present or

even exist at the time it was testified the statements were made.

DAVID McKINNON, a witness for the Government, testified: He met defendant in San Francisco after the World War, and had the discussion concerning the war, two or three months after the war first started, in September or October or November, 1914, somewhere in that locality. They were standing at the corner of Sansome and California streets at the time this conversation took place. Then Henry Albers says to the witness, "What do you think about our British cousins?" Witness said, "No British cousins of mine; nothing British were cousins of mine." Defendant then said, "Never mind, before we get through with them we will kill every man, woman and child in England" (153-158).

HENRY CERRANO, a witness for the Government, testified: That he was born in 1879 in Italy; was naturalized January 2, 1915. His occupation is that of a janitor, cleaning windows. Had been cleaning windows about four years for Albers Brothers. Recalled hearing Mr. Albers make a statement concerning the war. That was before October, 1915. It was before October, because in the month of October he quit washing windows for Mr. Albers. He was just cleaning the windows in the office of the Albers Brothers Milling Company. He saw the de-

> fendant, Henry Albers, there in the office. Well, he saw Mr. Albers once. He came in the office with a German-American paper, and he gave this paper to a young gentleman who was working at a typewriting machine; and giving this paper he says, "Look at that paper, see what the German army is doing; the German army is doing wonderful, and France and England come very easy." And then Mr. Albers went away from that room, and then the only words I heard after that, I heard these two words, "One Kaiser and one God." He didn't understand well what defendant said before that we were going to have one Kaiser and one God, but he was sure of the statement, "One Kaiser and one God." He heard very well them two words (136-139).

The Government also called the witnesses Olga Gomes (130-136), G. M. Wardell (150-153) and N. F. Titus (143-145) to give testimony concerning statements alleged to have been made by plaintiff in error at other times. The last mentioned testimony was without probative force respecting the question of intent, and only served to confuse the issue and discredit plaintiff in error before the jury. It appeared that at the time testified to by the witness Gomes, plaintiff in error was virtually crazy as the result of a protracted spree, and was so drunk at the time that he did not know where he was or what he was doing. The alleged statements were made in a taxicab and addressed to nobody (196-200). Miss Gomes testified in effect that

plaintiff in error stated that he was a Kaiser man and muttered the phrase "Deutschland uber alles," and when he was told to shut up by one of the occupants of the taxicab he said, "I don't care; I am a spy; I am a spy, and I am ready to be shot right now for Germany."

The witness Wardell, an amateur detective, testified that plaintiff in error remarked that "when the Germans got well organized with the submarines there would be no chance for any boats to go across," and witness thought that plaintiff in error said in substance that he hoped they would blow every British ship out of the water. The statement was alleged to have been made at Wheeler, in Tillamook County, Oregon, some time in February, 1918. It appeared that plaintiff in error was at Wheeler at that time upon a patriotic mission—to secure an American flag to place upon a boat that he and John O'Neill were engaged in salvaging (200, 236).

The witness N. F. Titus was permitted to testify in effect that plaintiff in error while engaged in calm, rational discussions with the witness had stated on several occasions that the press of America was dominated by the English press, and that the people of the United States were thereby misled in their estimate of the Belgian and other atrocities, and that our entry into the war was influenced by the British press: that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were

maybe swayed by party action, political action and selfish ends, and that the German forms of government were more efficiently, more ably and more conscientiously administered; that the people in Germany enjoyed life more than they did over here. They would go to church on Sunday morning and after church they could meet around at a little beer garden and sit around and play games and have a good time.

The jury in acquitting plaintiff in error upon Counts 5, 6 and 7 of the indictment affirmatively found that the utterances of plaintiff in error to the witness Titus did not show criminal intent, a conclusion that is at once apparent.

(Sandberg vs. United States, 257 Fed. 643.)

The record shows that the agents of the Department of Justice examined plaintiff in error's every step from 1914 until the time of the trial to discover the commission by him of any disloyal or unpatriotic acts or utterances, and found nothing (134, 152, 158, 226-230, 245, 246).

The Court imposed upon plaintiff in error the startling sentence of three years imprisonment in the penitentiary at McNeil's Island and a fine of Ten Thousand Dollars.

In the argument herein supporting the several assignments of error relied upon, such further notice will be taken of matters arising at the trial as may be required to illustrate and make plain the question presented for the Court's consideration.

SPECIFICATION OF ERRORS.

The errors relied upon by plaintiff in error are as follows:

I.

Error of the Court in overruling the demurrer of plaintiff in error to Count Three of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

II.

Error of the Court in overruling the demurrer of plaintiff in error to Count Four of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

III.

Error of the Court in overruling the demurrer of plaintiff in error to Counts Three and Four in the indictment, upon the ground that the facts stated in each of said counts of said indictment are insufficient to constitute an offense.

IV.

Error of the Court in overruling the demurrer of the plaintiff in error to Count Three of the indictment upon the ground that said count of the indictment is bad for duplicity.

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Error of the Court in overruling the demurrer of plaintiff in error to Count Four of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

III.

Error of the Court in overruling the demurrer of plaintiff in error to Counts Three and Four in the indictment, upon the ground that the facts stated in each of said counts of said indictment are insufficient to constitute an offense.

IV.

Error of the Court in overruling the demurrer of the plaintiff in error to Count Three of the indictment upon the ground that said count of the indictment is bad for duplicity.

V.

Error of the Court in overruling the demurrer of the plaintiff in error to Count Four of the indictment upon the ground that said count of the indictment is bad for duplicity.

VI.

Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Three of the indictment.

VII.

Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Four of the indictment.

VIII.

Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Three of the indictment.

IX.

Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Four of the indictment.

X.

Error of the Court in overruling the objection of defendant to the testimony of the witness Erwin C. Bendixen, wherein he was asked the following question by the United States Attorney: "Question: Just go ahead in your own way, without questions from me, and tell what conversation you had with Mr. Albers at that time, or what he said to anybody else while you were present." And in permitting the witness to answer that defendant made the remark, he said he was a German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you migh say, and he wanted to imply—this was in German—and he told witness that on the outside, to the outside world, why, he was an American, but down in his heart he was a German, and when he made that remark witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that!" He said, "You don't mean to say you would go to Germany and fight for the Kaiser?" Witness made that remark to him and defendant got up and said he would go back in the morning. He said he had served the Kaiser twenty-five years, and that America—he said, "I have served the Kaiser twenty-five years, and with America, shit, shit." That is just what he said to witness in German. Witness knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defend-

V.

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ant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to lick America. Then also in this conversation he made the remark, which is a very bad remark, in the German language, it was the remark "Schlach America." "Schlach America," in the German language, he takes the word "schlach" means to obliterate. It means to do anything to you against the country. When a man says "schlach" in German he means "schlach you," he is going to get you. This is witness' translation and that is the way it appears to him. Then, after he saw defendant was of that character and didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said, and Mr. Tichenor said, "Well, he has been saying that to all these men," and Mr. Tichenor said, "There must be some more to this." Defendant has been down in San Francisco and he must have been conspiring down there, making a contract or something. Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things, and then asked defendant if he had had anything like that to do—had done anything like that, and he said "no," he hadn't had anything to do like that.

He said he looked at witness, you know, out of the corner of his eye, like that, "Nein, nein." You understand that means, "No, no," and he would not talk any more. During his talks with defendant, before that, there were one or two things that probably should be brought up in this case, in regard to that, after witness had introduced himself to him—why, he introduced himself in German, and defendant told him that—in German—"Du bist ein ecte Deutscher," or "You are a genuine German." Also during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun. He said German. He said they were German. He also told witness of sometrouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, tomorrow, he said. After he told witness this "nein, nein," or "no, no," then defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter he wanted to go tobed;thenthewitness went to the rear of the observation car again. When he spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen;" that means, "We have won the war." He expressed himself that he was willing to go back—he was going back—in the morning. He told witness he had ten million dollars and that he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour late. He re-

ported to Mr. Tichenor what he had heard in that room and made a memorandum of it himself.

XI.

Error of the Court in overruling the objection of the defendant to the testimony of the witness Henry Cerrano, and permitting said witness to testify, over defendant's objection, as follows: Before October, 1915, I saw Mr. Albers once. He came in the office with a German-American paper and he gave this paper to a young gentleman who was working at a typewriter machine, and giving this paper he says, "Look at that paper; see what the German army is doing. The German army is doing wonderful and France and England come very easy," and then Mr. Albers went away from that room and the only words I heard after that, I heard these two words, "One Kaiser and One God." I didn't understand well what he said before, if we were going to have one Kaiser and one God, or that we will have one Kaiser and one God, but, all what I am sure "One Kaiser and one God," I heard very well them two words.

XII.

Error of the Court in overruling the objection of the defendant to the testimony of the witness David McKinnon, wherein he was asked the following question: "Question: Just state the conversation that took place concerning the war." And in permitting the witness to answer that in 1914 he had a conversation with the defendant wherein defendant

said: "What do you think of our British cousins?" "Never mind; before we get throught with them we will kill every man, woman and child in England."

XIII.

Error of the Court in instructing the jury relative to the purpose and effect of the testimony sought to be elicted from the witness David McKinnon, while said witness was on the stand, as follows: "This testimony is offered, not to prove the acts that are alleged against him constituting the offense, but to prove or to show, if the testimony has that effect, the intent or not the intent but the bent of the defendant's mind or his attitude towards this country and towards that of Germans, and it will only be admitted for that purpose and none other, and it is admitted bearing upon intent so that the jury is put in possession of the bent of mind or of the attitude of the defendant prior to the time when these acts are alleged to have been committed, to enable them better to say what his intent was and by considering all the testimony in the case, and I will admit it for that purpose. I will say to the jury now that this testimony is not admitted for the purpose of proving the allegations in the indictment or any of them by which this defendant is charged with the offenses therein stated, but it is admitted for this purpose and this purpose only as tending to show the bent of mind of the defendant or his attitude towards this country as compared with his bent of mind and attitude towards the Imperial

Government of Germany, and is for the purpose of aiding you, taking it in connection with all the testimony that will be offered in the case, to determine what his intent was if it be proven that he has made the statements which it is declared by the indictment he has made, and by taking this in connection with all the testimony in the case it will aid you in determining what his intent was in making such remarks or in making such statements as may be proven to your satisfaction beyond a reasonable doubt."

XIV.

Error of the Court in overruling the objection of the defendant to the testimony of the witness N. F. Titus, wherein the defendant was asked the following question: "Question: Now, Mr. Titus, what conversation did you have with Mr. Albers concerning the war, commencing about January or February, 1917, and running up to June 15, 1917?" And in permitting the witness to answer that the conversations he had with Mr. Albers were numerous and he was unable to fix any definite day during that entire period when any particular conversation took place. He recalled very distinctly the nature and substance of the conversations, and, to begin with, the first point that came to the mind of witness was the discussion of Belgium and other atrocities, this topic arising from the current newspaper comments. In discussing those features, that particular point with Mr. Albers, he uniformly made

the statement that they were all lies and that the reason they got them in that shape was that the press of America was dominated by the English press, and that if we wished to get the truth of the situation we should read the German papers. He further discussed the trouble that the United States was having with Germany, the Imperial Government of Germany, respecting the various points at issue at that time, the exchange of notes which followed—and he believed—stated himself that the United States was misled in their position and the fact that they were misled was due to the influence of the British press and on numerous occasions emphasizing that point. Defendant frequently discussed the conditions in Germany, his visits over there, his great liking for the condition of living in Germany, the fact that the people there enjoyed life better than they do over here, and in discussing the life in Germany he frequently mentioned, or made comparisons between the institutions in this country and the institutions in Germany, laying particular emphasis on our forms of municipal government, speaking of our State government—its efficiency, etc., and in comparison of the national forms of government, and in every particular case in these comparisons emphasizing the point that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were maybe swayed by party action, political action, and selfish ends and that the German forms of government were more efficiently and more ably

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and more conscientiously administered. That occurred along the first part of the year 1917 on numerous occasions. Defendant frequently mentioned at that time that the people in Germany enjoyed life more than they did over here. Well, the first thought that occurred to the mind of witness the first time defendant mentioned that was that he spoke of the convivial spirit of the people over there. He said they would go to a church on a Sunday morning. After church they could meet around at a little beer garden and sit around and play games and have a good time and he felt that the people there enjoyed life more than they did here. It was impossible, witness said, for him to tell whether these conversations took place in April, May, June or July, but the subject was up a number of times and defendant reverted back to the old primary consideration that defendant believed that we in this country were dominated by the British press. That seemed to be a particular hobby of his and he constantly referred to it and reverted to it, stating that we were misled by the British press and he felt that we were not justified in going to the length that we did in actually entering the war.

XV.

Error of the Court in overruling the objection of defendant to the testimony of the witness Eva T. Bendixen, wherein she was asked the following question: "Question: Now, what conversation was had at that time, if any, between Mr. Nippolt and

Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him?" And in permitting the witness to answer as follows: Answer: Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditions remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so; and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was interested in the firm and that his first thought was probably he should wire his uncle and then again he thought it would bring a reflection in some way or other; that he better leave just everything alone."

XVI.

Error of the Court in overruling the motion of the defendant to take from the jury and to strike out the testimony of the witness Horace A. Cushing as follows: He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a thou-

sand dollars to fifty cents, and loan witness the fifty cents, that the Kaiser could lick the world.

XVII.

Error of the Court in overruling the motion of defendant to take from the jury and to strike out the testimony of the witness John H. Noyes as follows: Yes, sir, as he recalled it, he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of ten dollars that the Germans would not be in London in sixty days. Mr. Albers bet that the Germans would be in London in sixty days. He knew one other bet that he recalled. That was in December, 1915, that the war would be over April 1, 1916. Mr. Albers said the war would be over April 1, 1916. One of these bets was paid, he didn't know which. Both of them were for ten dollars.

XVIII.

Error of the Court in refusing to give the following instruction:

The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute.

XIX.

Error of the Court in refusing to give the jury the following instruction:

While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

XX.

Error of the Court in refusing to give the jury the following instruction:

If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3, and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3, and 4 of the indictment.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant

did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at the same time, then you cannot find him guilty upon Counts 1, 2, 3, and 4, although such inability and lack of intent was the result of intoxication.

XXI.

Error of the Court in refusing to give the jury the following instruction:

If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3, and 4 of the indictment, and that such statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3, and 4.

XXII.

Error of the Court in refusing to give the jury the following instruction:

If you find from the evidence that F. B. Tichenor, a Deputy United States Marshal, and L. E. Gaumaunt, a deputy sheriff of a county in the State of Washington, induced and incited, or lured the defendant on, to make the statements charged in the indictment under the circumstances under which it has been testified such statements were made, and that said officers thereby procured the defendant to

make said statements, you should find the defendant not guilty upon each of the Counts 1, 2, 3, and 4 of the indictment.

XXIII.

Error of the Court in refusing to give the jury the following instruction:

E. C. Bendixen was produced by the Government as a witness to prove the charges set forth in Counts 1, 2, 3, and 4 of the indictment. You are instructed to disregard the testimony of said witness Bendixen for the reason that the testimony given by him does not tend to support the charges in said counts of the indictment.

XXIV.

Error of the Court in refusing to give the jury the following instruction:

Before you can find the defendant guilty under Count 3 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements or the substance thereof alleged and set forth in that count of the indictment; second, that he made said statements wilfully and with the intention to incite, provoke or encourage resistance to the United States and to promote the cause of its enemies; and, third, that said statements, if you find beyond a reasonable doubt that any were made, would naturally and legitimately incite, provoke or encourage resistance to the United States and promote the cause of its enemies.

XXV.

Error of the Court in refusing to give the jury the following instruction:

Under the allegations of Count 3 of the indictment the Government must prove to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty, that the defendant wilfully intended by the alleged statements both to incite, provoke and encourage resistance to the United States and to promote the cause of its enemies, and it will not be sufficient for the Government to prove that the defendant wilfully intended to bring about only one of such results.

XXVI.

Error of the Court in refusing to give the jury the following instruction:

The words "support," "favor," and "oppose" import wilfulness and intent, and it is alleged in the indictment that the statements set forth therein were made wilfully. Therefore before you could find the defendant guilty under Count 4 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements as alleged in the indictment or in substance as alleged in the indictment; second, that the statements made by defendant, if you find beyond a reasonable doubt that he made any of the statements alleged, would naturally aid, defend and vindicate the cause of the Imperial German Govern-

ment with which the United States was then and there at war, and would also naturally, necessarily and legitimately hinder and defeat or prevent the success of the cause of the United States in said war; and third, that said statements,if any were made by the defendant wilfully and knowingly with intent to support and favor the cause of the Imperial German Government in said war, and oppose the cause of the United States therein.

XXVII.

Error of the Court in refusing to give the jury the following instruction:

Under the charge of Count 4 of said indictment the Government must satisfy you beyond a reasonable doubt that the defendant criminally intended both to support and favor the cause of the Imperial German Government and to oppose the cause of the United States in the war, and that the statements made, if any, would naturally produce both said results; otherwise you should acquit the defendant.

XXVIII.

Error of the Court in giving the jury the following instruction:

It is proper that I should instruct you as to what is meant by resistance to the United States as used in this law and in this charge. The other words in the law and in the charge are plain and were used and have been used, in my opinion, in the ordinary, every-day, common-sense meaning.

Resistance as a proposition of law means to oppose by direct, active and quasi-forcible means, the United States; that is, the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in this war. It means more than inciting, provoking or encouraging refusal of duty or obstructing or attempting to obstruct the United States. The element of direct, active opposition by quasi-forcible means is required to constitute the offense of resisting the United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking, or encouraging forcible resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of this war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war against the United States. The cause of the United States as used in this act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It does not mean the aims of the war in

the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination.

POINTS AND AUTHORITIES.

I.

The character of every act depends upon the circumstances in which it is done. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck vs. United States, 249 U. S. 47, 39 Supt. Ct. 247; 63 L. Ed. — (March 3, 1919).

Debs vs. United States, 249 U. S. 211, 39 Sup. Ct. 75, 252; 63 L. Ed. — (March 10, 1919).

Sandberg vs. United States, 257 Fed. 643.

II.

Every man is presumed to intend the necessary and legitimate consequences of what he knowingly does or says. The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken. A jury has no more right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without the evidence.

Von Bank vs. United States, 253 Fed. 641.

III.

A defendant cannot be convicted of a crime which was provoked or induced by a Government officer or agent and which otherwise would not have been committed.

United States vs. Lynch, 256 Fed. 983.

Woo Wai et al. vs. United States, 223 Fed. 412.

Voves vs. United States, 249 Fed. 191.

Sam Yick et al. vs. United States, 240 Fed. 60.

IV.

To render evidence of other similar acts or utterances admissible for the purpose of showing intent, they must in themselves and under the cir-

cumstances done or made tend to show or prove such intent.

United States vs. Schulze, 253 Fed. 377.

United States vs. Denson, Bulletin No. 142.

V.

The statements which it is claimed the accused made must be set forth in the indictment and the proof of the statements must correspond with the charge of the indictment.

Foster vs. United States, 253 Fed. 481.

Collins vs. United States, 253 Fed. 609.

VI.

Where it is charged that statements in the English language were made by the accused, such charge cannot be proved by evidence that the statements were made in the German language or in any foreign language. A fatal variance arises.

Stichtd vs. State (of Texas), 8 Am. St. Rep. 444 and note.

Zeig vs. Ort. 3 Pinney (Wis.) 30.

Wormouth vs. Cramer, 3 Wend. (N. Y.) 394, 20 Am. Dec. 706.

Schultz vs. Sohrt, 201 Ill., App. 74.

Kerschbaugher vs. Slusser, 12 Ind. 453.

3 Phillips' Evidence, page 551.

State vs. Marlier, 46 Mo. App 233.

Kunz vs. Hartwig, 151 Mo. App. 94.

Townshend on Libel and Slander, 4th Ed., Sec. 330.

VII.

Where the words are spoken in a foreign language, the original words should be set out in the indictment and an exact translation should be added. Giving the translation without the original, or the original without a translation, is not sufficient.

Newell on Slander and Libel, 3rd Ed., Secs. 325, 768.

Bishop's Directions and Forms, Sec. 619 and note at p. 358.

Bishop's New Criminal Procedure, Vol. 1, Sec. 564.

2 Phillips' Evidence, page 236.

Simonsen vs. Herold Co., 61 Wis., 626.

Pelzer vs. Benish, 67 Wis. 291.

Heeney vs. Kilbane, 59 Ohio St. 499.

Romano vs. De Vito (Mass.); 6 Am. & Eng. Annotated Cases 731 and extensive note.

Hayes vs. Nutter, 2 Am. Law Rep., and note page 365.

Odgers on Libel and Slander, 4th Ed., pages 119, 580.

Zenobio vs. Axtel, 6 Term 162, 9 Eng. Rul. Cases 87.

Cook vs. Cox, 3 Maul & Selwyn 110, 117; 9 Eng. Rul. Cases 89.

Rex vs. Peltier, 28 How. St. Tr. 529.

VIII.

The words should be charged as spoken. They should then be followed by a proper translation, and in this respect there is no difference between a civil and criminal prosecution.

State vs. Marlier, 46 Mo. App. 233.

Stichtd vs. State (of Texas); 8 Am. St. Rep. 444 and note.

Cook vs. Cox, 3 Maul & Selwyn 110, 117; 9 Eng. Rul. Cases 89.

IX.

It is presumed that the English language was used until the contrary is made to appear.

Heeney vs. Kilbane, 59 Ohio St. 499.

Kerschbaugher vs. Slusser, 12 Ind. 453.

X.

There cannot properly be said to be a communication of language by one to another unless that other understands the signification or meaning of the language said to be communicated. To one who does not understand the language in which a publication is made, it is to him nothing more than unmeaning sounds or signs and not language.

Townshend on Libel and Slander, 4th Ed., Sec. 96.

XI.

Where the utterances charged are made in a foreign language, it is necesary to prove that those who were present understood that language.

Newell on Slander and Libel, 3d E., Sec. 325.

Odgers on Libel and Slander, 4th Ed., pages 119, 580.

XII.

To charge a person with uttering slanderous words in the English language certainly does not inform the defendant that he will be required to meet and defend words uttered by him in a different language.

Stichtd vs. State (of Texas), 8 Am. St. Rep. 444 and note.

Wormouth vs. Cramer, 3 Wend. (N. Y.) 394, 20 Am. Dec. 706.

XIII.

If upon the whole evidence a reasonable doubt exists of a defendant's capacity to form the requisite criminal intent, he should be acquitted even though such inability is the result of voluntary intoxication, and the jury should have been so instructed in this case.

Davis vs. United States, 160 U. S. 469, 484, 487.

Hotema vs. United States, 186 U. S. 413.

Perkins vs. United States, 228 Fed. 408, 416.

United States vs. Chisholm, 153 Fed. 808, 810.

Post vs. United States, 135 Fed. 1, 10.

German vs. United States, 120 Fed. 666.

Stuart vs. Reynolds, 204 Fed. 709, 715.

McKnight vs. United States, 115 Fed. 972, 976.

Glover vs. United States, 147 Fed. 426, 431.

XIV.

Words spoken in sudden anger and without deliberation do not constitute a violation of the Espionage Act.

United States vs. Krafft, 249 Fed. 919.

United States vs. Dodge, Bulletin 202.

XV.

Where questions are aggressively put to a person and he is heckled into hasty and inadvertent utterances, the same do not constitute a violation of the Espionage Act.

United States vs. Dodge, Bulletin 202.

Rex vs Manshrick, 32 Dominion Law Rep. (Can.) 590.

XVI.

Where the statutory definition of an offense includes generic terms or embraces acts which it was not the intention of the statute to punish, the indictment must state species, it must descend to particulars.

United States vs. Cruikshank, 92 U. S. 542.

Batchelor vs. United States, 156 U. S. 426.

United States vs. Hess, 124 U. S. 483.

XVII.

An indictment or information charging two or more distinct and separate offenses in one count is bad for duplicity even though the offenses arise under the same statute.

14 Rul. Case Law, title Indictments and Informations, Sec. 40.

United States vs. Norton, 188 Fed. 256, 259.

32 Cyc. 376.

United States vs. Dembouski, 252 Fed. 894.

United States vs. American Naval Stores Co., 186 Fed. 592.

Maryland vs. United States, 216 Fed. 326.

Llewellyn vs. United States, 223 Fed. 18.

Ben vs. State, 58 Am. Dec. 234; note p. 239.

ARGUMENT.

The passion and heat engendered by the war gave this case undeserved prominence. By the prosecution, the press and Dame Rumor, plaintiff in error has been held up to the public as an active, wily and resourceful propagandist, possessing inordinate wealth and great capacity for injury to the United States, when in truth he is merely a dull, harmless American citizen of German birth; who, beginning with nothing, by hard work has acquired moderate wealth, and who had and has no capacity or inclination to harm the United States or aid its enemies; and who did more to promote the cause of the United States in the war than all his accusers together. He was in no sense a propagandist or agitator.

Plaintiff in error was proceeded against as though guilty of "high treason" when at most he was "drunk and disorderly." The influence of all

this upon the jury and the Court is reflected in the verdict against defendant and the grossly excessive punishment imposed. As said by a Canadian judge, "something is due to the dignity of the law" in these cases. In the case referred to Judge Stuart said:

> "Crankshaw in his notes to the Criminal Code mentions only four cases, between 1795 and the present time, of prosecution for seditious words, and they were all cases of public meetings and addresses. He says after speaking at length of seditious libel: 'with regard to seditious words they have on some few occasions, been made the subject of prosecution.' There have been more prosecutions for seditious words in Alberta in the past two years than in all the history of England for over 100 years and England has had numerous and critical wars in that time. The Napoleonic crisis occurred in that period. I do not wish to say anything which would repress the patriotic zeal of our public officials but we all have great confidence in the stability and safety of our institutions and of certain victory of our cause. In the circumstances I think something is due to the dignity of the law, and that the Courts should not, unless in cases of gravity and danger, be asked to spend their time scrutinizing with undue particularity the foolish talk of men in bar rooms and shops or a word or two evidently blurted out there impulsively and with no apparent de-

liberate purpose." (Rex vs. Trainor, 33 Dom. Law Rep. 658.)

Evidence Shows Criminal Intent Absent.

Error is assigned by plaintiff in error upon refusal of the Court to direct the jury to acquit defendant. (Specifiiation of Errors VI, VII, VIII, IX.) Thereby the question is presented whether the evidence warranted the jury in finding plaintiff in error guilty. Plaintiff in error earnestly contends there was an entire absence of evidence to establish the intent essential to conviction; that the evidence on the contrary showed the absence of such intent.

Count 3 of the indictment charges that the defendant made the statements on October 8th on the train, wilfully and with the intent (a) to incite, provoke and encourage resistance to the United States and (b) to promote the cause of its enemies. The language of the charge follows the language of the statute. It will be conceded that all of the prohibitions of the statute have reference to the Government's war activities and war measures or to the war measures of its enemies, and not to activi ties and measures unconnected with the war. It will also be conceded that the resistance here referred to is affected by the element of direct active opposition by quasi-forcible means to the war measures or war activities of the United States, and that to promote the cause of its enemies means to help and give aid or assistance to the war measures and war activities of the enemies of the United States

It at once appears that the intent to put in motion force or quasi force, as it is sometimes expressed, necessary to constitute the "resistance" referred to in the charge, could by no possibility be present.

The Supreme Court in a recent case arising under the Espionage Act, said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." (Schenck vs. United States, 249 U. S. 47; 39 Sup. Ct. 247; 63 L. Ed. ——; March 3, 1919.)

Measured by this rule, the evidence falls far short of establishing a case against plaintiff in error. Instead of creating a clear and present danger that they would bring about any of the substantive evils named in the statute, the words used by plaintiff in error under the circumstances could by no possibility have brought about any of such evils. There was no danger in the situation, and none to be apprehended, and everyone connected with the matter knew it.

To warrant conviction, the evidence must clearly disclose what war measure or activity of the United States was aimed at by plaintiff in error, or what war measure or activity of its enemies he intended to promote, and must point out wherein the

statements charged or the circumstances under which they were uttered disclose or show such intent. The use of words with any one of a large number of intents is prohibited by the section of the statute under consideration, all of which refer to war measures and war activities; but plaintiff in error could have entertained none of such intents other than those embraced in Count 3 of the indictment, as it cannot be said that Congress would more than once prohibit the same act done with the same intent in the same paragraph of the law. Necessarily the intents essential to conviction under Counts 1 and 2 of the indictment were not intended, for the jury found that they did not exist.

Section 3 of the Espionage Act as amended prohibits the making of statements with intent: (1) to interfere with the operation or success of the military or naval forces of the United States; (2) to promote the success of the enemies of the United States; (3) to obstruct the sale by the United States of bonds or other securities of the United States; (4) to obstruct the making of loans by or to the United States; (5) to incite or attempt to incite insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States; (6) to obstruct or attempt to obstruct the recruiting or enlistment service of the United States; (7) to abuse or profane (a) the form of government of the United States, (b) the Constitution of the United States, (c) the military or naval forces of the United States, (d) the flag of the United States,

(e) the uniform of the army or navy of the United States; (8) to bring the form of the government of the United States, the Constitution of the United States, the military or naval forces of the United States, the flag of the United States or the uniform of the United States into contempt, scorn, contumely or disrepute; (9) to incite, provoke or encourage resistance to the United States; (10) to promote the cause of the enemies of the United States; (11) to cripple or hinder the United States in the prosecution of the war by urging, inciting or advocating curtailment of production of products necessary or essential thereto; (12) the advocate, teach, defend or suggest the doing of any of the acts or things enumerated in Section 3 of the Espionage Act; (13) to support or favor the cause of any country with which the United States is at war; (14) to oppose the cause of the United States in the war.

The war activities and measures of the United States covered by Section 3 of the Espionage Act, and by necessity excluded from among the intents that plaintiff in error could have had in relation to the charge in Count 3 of the indictment, cover a large field and greatly narrow the war measures and war activities at which plaintiff in error might have aimed. Specific reference is made in the statute to the operation and success of the military and naval forces, to the sale of securities and obtaining of loans, to inciting or attempting to incite, insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces, to obstructing the

recruiting and enlistment service, and to the curtailment of production of war supplies. Possibly there were other war measures and war activities than those thus expressly defined by statute at which plaintiff in error might have aimed a criminal intent, but if so he is entitled to have the same pointed out and named, and a clear showing made as to how and in what manner the evidence discloses the same. A conviction cannot be sustained upon mere speculation or possibilities not defined by the evidence.

The rule of fairness and justice which demands that the prosecution produce evidence which clearly points out and defines the war measures that it is claimed defendant intended should be resisted, applies equally to the second clause of the charge in Count 3 of the indictment and to the charges in Count 4 of the indictment. This rule requires that the evidence should clearly and unmistakably point out and define the war measures of the enemy which it is claimed defendant intended should be prompted, aided, defended or vindicated, otherwise the jury cannot properly find the presence of the intent essential to conviction.

The second clause of the charge in Count 3 of the indictment charges plaintiff in error with making the statements attributed to him with intent to promote the cause of the enemies of the United Sates, reference being had to Germany; that is to say, with intent to aid and help Germany in its war measures and war activities against the United

States. Count 4 of the indictment charges in effect that the defendant made the statements wilfully and with intent to aid, defend and vindicate the military measures of Germany and to hinder, defeat and prevent the success of the military measures of the United States in the war between Germany and the United States. The utterances of plaintiff in error under the circumstances shown by the evidence would and did have the opposite effect upon his hearers, and would produce a result contrary to that accompanying the essential criminal intent, and consequently the jury was without evidence of intent and their verdict was contrary to the evidence.

The decision of this Court in the case Sandberg vs. United States (257 Fed. 643) is pertinent to the situation disclosed by the evidence in this case.

In the case of Von Bank vs. United States (253 Fed 641), the Circuit Court of Appeals for the Eighth Circuit, Judge Carland speaking for the Court, used language particularly appropriate to the situation here. He said:

> "The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken. A jury has no more right to draw an inference from facts that do not necessarily and legitimately authorize such inference than to find any other fact without the evidence.
>
> "The question now presented is, Would the

words spoken under the circumstances attending their utterance necessarily and legitimately cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces? If we presume, as we well may, the military and naval forces to be constituted of patriotic citizens, would not the words used by the defendant with respect to the flag when heard by them cause the flame of patriotism to burn the brighter in indignant protest rather than cause insubordination, disloyalty, mutiny or refusal of duty?

"It is not the language of the wily agitator or propagandist. The language used by the defendant is unpatriotic and offensive to any one who appreciates what the flag has always and still stands for; but if this be a government of laws and not of men, the defendant should stand unprejudiced by the passions of the times when charged with the commission of crime. * * * W are of the opinion, therefore, that there was no evidence from which the jury had the right to find or infer that the defendant used the language quoted above with the intent to cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States."

Neither was plaintiff in error an agitator or propagandist. He was not making a public address. and never had made one. There is no evidence in the case that he ever had at any time when sober

made a single statement or did a single thing indicating anything but the highest patriotic regard for the United States and its cause. The necessary and legitimate consequences of the words spoken by plaintiff in error under the circumstances attending their utterance here, like in the Von Bank case, were to cause the flame of patriotism in any good American citizen to burn the brighter in indignant protest rather than produce any of the results prohibited by the statute. The jury was not authorized to find a criminal intent present when all the evidence showed its absence.

Here we have a man advanced in years whose resources from the beginning of the war had been liberally used in promoting the war measures and war activities of the United States throughout the war. He was nominally at least the head of a large manufacturing concern doing business throughout the Pacific Coast. On the occasion in question he was vulgarly drunk in the smoking compartment of a Pullman car. Because he was free in distributing his liquor to those who came into the compartment, and spoke with a German accent, the witnesses called by the Government conceived the notion that it would be patriotic upon their part to ply him with questions concerning his attitude towards the war; and if his replies disclosed any German leanings to report him for prosecution. All admit that he was drunk, but the claim is made that he was not so drunk but what he was in possession of his faculties. To possess the intent essential to a violation

of the Act under the circumstances here disclosed, plaintiff in error necessarily would have some design and cunning and deep underlying purpose to effect material injury to the United States. The war had been in progress 18 months at the time. Prosecutions by the score had occurred under the Espionage Act. It was known that the Government had but to accuse to secure conviction.

Deputy Marshal Tichenor, when he found Albers in a drunken condition upon the railway car, might have arrested him for having his bottle of whiskey there, but instead of doing this he set about to systematically build up a case of another kind against him. Tichenor stood at the doorway listening and getting reports from those whom he sent in to make evidence. His zeal not only led him to urge strangers to aid in this job, but although from his first appearance upon the scene until the porter carried off the inebriate and put him to bed he knew that Albers was using whiskey and that these men were plying him with liquor, he was active in procuring foolish, maudlin and absurd utterances from the victim with the hope of finding something in them that could be used to make a case against him as an enemy of his country.

Mr. Mead, the first man to engage in conversation with him, was by him called a damn fool shortly after the conversation commenced, and he was so far along in his cups that he did not even notice the anger and resentment which the remark aroused in Mead. When Deputy United States

Marshal Tichenor told him to put away his bottle of liquor that he had in plain sight of everyone entering the smoking room of the car—a violation of Federal and State prohibition laws—he paid no attention to the direction but mumbled incoherently; and it was left to Gaumaunt, a Special Deputy Sheriff of the State of Washington, to put the bottle out of sight; and as Tichenor was leaving the smoking compartment, plaintiff in error applied a profane epithet to him, whereupon Gaumaunt showed him his badge and told him he, Gaumaunt, was an officer of the law and that Tichenor was a Deputy United States Marshal, and suggested that plaintiff in error had better go to bed, to which information and suggestion plaintiff in error said Tichenor couldn't get him and told Gaumaunt to go to Hell. Plaintiff in error was also blind to the scuffle Gaumaunt and the porter had over his grip and booze. At this juncture witness Kinney, in a burst of patriotic zeal, commenced insistently and hostilely to discuss the war with plaintiff in error, and every time he got an answer he rushed out, accompanied by Gaumaunt, and wrote it down and returned and indignantly continued the discussion, repeating the operation as many as six or seven times without arousing any suspicion on the part of plaintiff in error; and when plaintiff in error was approached by the witness Bendixen speaking German, "he just raved on." Promptly at the end of the session, plaintiff in error went to sleep and was carried to his berth by the porter and put to

bed with his clothes and shoes on.

At most the utterances of plaintiff in error were the protest and defy of a harried and heckled victim of hostile numbers. If the man could have by any possibility had in mind any intent prohibited by this statute, and by his utterances at the time under consideration was actually attempting to put that intent into effect, he should have been acquitted on the ground that he was insane, for no one but a crazy man would under the circumstances have endeavored to effect any such intent. Here were two officers of the law and two other men admittedly bitterly hostile to plaintiff in error, and one speaking German warning him that they were officers of the law he was talking to, as well as hostile citizens aiding them; and yet, it is claimed he was delivering himself of utterances with the intent prohibited by the statute.

The words attributed to the defendant instead of promoting any such intent were bound to have the contrary effect, to produce exactly the opposite result, which it is claimed was intended; and they did produce exactly the opposite result and the one they were bound to produce. It is absurd to say that a man competent and capable of forming and endeavoring to put into effect a criminal intent would do the things that any man with half sense would know would produce the opposite result.

If plaintiff in error could by any possibility have harbored any of the intents prohibited by the stat-

ute, either expressly or by inference, and contemplated putting the same into effect, he must have expected to use the persons addressed by him as instruments for accomplishing his evil intent. To do so he would hardly proceed at the outset to insult them, nor would he continue when he was warned, or discovered that they were preparing to destroy him. Moreover, had those in the hearing of plaintiff in error been passive or friendly instead of actively hostile, they would have been presumed to be loyal, patriotic citizens who would not be moved to disloyalty or hostility to the United States by the mutterings of a drunk man.

The evidence offered by the Government of collateral statements for the avowed purpose of proving intent added absolutely nothing to the Government's case upon the question of intent. None of such collateral statements had any tendency to establish any of the intents which it was incumbent upon the Government to establish beyond a reasonable doubt. They did not and could not supply intent to frantic and irresponsible utterances extracted by hostile hearers from a man far gone in drink. They did not and could not supply criminal intent in circumstances that no man in his right mind would attempt to bring about a result involving such intent. They did not and could not supply criminal intent to maudlin boasts made to and in the presence of officers of the law and in the face of imminent prosecution.

The contention that the criminal intent neces-

sary to a conviction under Counts 3 and 4 of the indictment as shown by the evidence and circumstances in the case is nothing short of absurd, and the motion for a directed verdict should have been allowed by the Court.

Heckling Directed by Government Officers Provoked Utterances, Hence No Offense.

With a view to establishing the basis of a criminal prosecution against plaintiff in error, officers of the law and those acting with them deliberately provoked him to make the utterances upon which this prosecution is founded. This entitled plaintiff in error to a directed verdict and it was error to refuse his request therefor (Specification of Errors VI, VII). "A defendant cannot be convicted of a crime which was provoked or induced by a Government officer or agent and which otherwise would not have been committed" (United States vs. Lynch, 256 Fed. 983).

It conclusively appears from the evidence that plaintiff in error had made no objectionable remarks on the entire trip, either to Lot Q. Swetland, the only man he knew upon the train, or to Bendixen, Gaumaunt or the others, until Tichenor got upon the train and proceeded to organize the witnesses mentioned for the purpose of making and recording evidence against plaintiff in error. The organization completed, they set upon him and enticed and heckled and provoked him into making

the utterances that are here contended violate the statute.

At the time plaintiff in error was verbally assailed by Deputy Marshal Tichenor and those acting with him, plaintiff in error had been upon the train over 20 hours. He had sought intercourse and communication with no one, but had devoted his attention wholly to the supply of liquor he had with him.

There were a thousand employees in the concern of which he had been president for more than 15 years. Many of these men had been in his employ for more than 20 years, and large numbers of them for many years, a fact which testifies to his standing as an employer. If he had any disposition to exert any influence against the United States and in favor of Germany, it would naturally be expected that he would bring it to bear upon some of these men, either directly or indirectly. Instead, however, 46 or 48 men, most of them volunteers, promptly joined the American forces upon the outbreak of the war, going from the plant where the plaintiff in error spent most of his time. Eight men went from his office, all but one volunteers, and seven of these became officers in the United States army. Practically everyone of such men was counseled and advised by plaintiff in error to join the military forces of the United States at once, and go and get the thing over with, and each and all were encouraged to believe that it would make better men of them; and their morale was promoted by the promise upon the part of plaintiff

in error that their jobs would be open to them upon their return, and in the meantime their dependents, if any, would be properly cared for. If there were any men in the United States that plaintiff in error had influence with and might have been able to induce or persuade to disloyalty, they were to be found among his employes, who had been with him for years and had received uniformly just treatment at his hands. Those employes who remained; that is, did not go to war, made a record of a hundred per cent in their contributions and subscriptions to every drive for funds, whether for Liberty Bonds or for war activities where the money subscribed was an outright gift. Each and every employee contributed or subscribed in each and every drive according to his or her abilities. The contributions of the Company of which plaintiff in error was president to war activities and relief funds included every organization engaged therein, and in the aggregate amounted to over $30,000.00. The subscriptions of the company to Liberty Bonds amounted to $300,000.00. Not one dollar had ever been contributed by plaintiff in error or his company to any German cause or activity, either before or after the United States entered the war.

Having in mind this record of the laudable support given to the United States in the war by plaintiff in error; that it was apparent to everyone that Germany was about to collapse, and did collapse within a month thereafter; that plaintiff in error never at any time uttered a word in discouragement

of the cause of the United States or calculated to promote the cause of Germany to a single one of the persons with whom he had some influence in the entire period of the war; that the men to whom he is said to have addressed himself consisted of a Deputy United States Marshal, a Special Deputy Sheriff and three civilians, two of whom were in Class 4 of the Selective Draft and the other above draft age; that none of these men had participated in the war in any way in the 18 months it had been in progress; and that they were all openly hostile to plaintiff in error; that he knew Tichenor and Gaumaunt were officers; that he was conscious that rumor had questioned his loyalty because of his German birth; it is humanly possible for plaintiff in error to have delivered himself of the utterances charged against him voluntarily or with any purpose prohibited by the statute, and equally impossible that such utterances could have produced any of the results the statute was designed to prevent.

It clearly appears from the testimony of the witnesses that the utterances of plaintiff in error made in the hearing and understanding of Tichenor, Gaumaunt, Mead and Kinney were provoked by remarks addressed to him by either Mead, Gaumaunt or Kinney. The manner of delivering the utterances, the substance thereof, show this. It is significant that none of these persons were willing to remember or testify to what they said to plaintiff in error to arouse him to express himself as he is said to have done. No witness testified that

he was engaged in an apparent effort to persuade his hearers to anything or to produce any conviction in their minds; but on the other hand it appears that he resented their efforts to communicate with him, and told Mead and Gaumaunt to go to Hell, and profanely referred to Tichenor, knowing that Gaumaunt and Tichenor were officers of the law. Such conversation as Kinney had with plaintiff in error consisted of a running exchange of retorts on both sides. Kinney refused to remember or testify to what he said to plaintiff in error, but admitted that he did go in there and deliberately, very deliberately set about to procure from plaintiff in error seditious utterances.

By the time Bendixen accosted him in German at the direction of Tichenor, plaintiff in error had become so wrought up by the badgering that Gaumaunt, Mead and Kinney had given him that, with the additional drinks he had taken, he was in a drunken frenzy and was beyond all restraint; and, according to the testimony of Bendixen, "just raved on," in spite of notice and warning Bendixen gave him that those about him were planning his destruction. Immediately when Tichenor and his aids ceased aggravating him, plaintiff in error fell asleep, and thereafter when put to bed by the porter and brakeman slept throughout the night with his clothes and shoes on.

The decisions of the courts which have considerered cases made by the activity and zealousness of Government officers and agents, establish the

principle that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case; that wherever the circumstances and conditions are such as to make it unconscionable for the Government to press its case, a conviction will not be upheld. Most, if not all, of the prohibitions of the Espionage Act are directed against the commission of verbal acts. To constitute a violation of the statute such acts must be accompanied by the criminal intent likewise prohibited by the statute. It has been pointed out that no criminal intent was or could have been present in this case. It is manifest that the verbal acts charged against plaintiff in error would not have been committed but for the action deliberately planned and carried out by Tichenor and Gaumaunt intended to and which did incite and provoke said verbal acts; that the plan of these two officers and their aids was carried out in spite of the fact that plaintiff in error was at the time so drunk that he was loudly cursing and swearing at every one who addressed him, and displayed complete want of responsibility. He made no statements of the character charged in the indictment before the plan of Tichenor to build up a case was initiated and put into effect, and made none after the heckling ceased. The action of these officers plainly and clearly incited, provoked and induced the alleged violation of the law, and without such action the verbal acts charged against plaintiff in error would not have been committed. There can be no claim

here that plaintiff in error planned or had in mind committing the alleged verbal acts, either with or without the intent prohibited by the statute, and that these officers were merely engaged in detecting the commission of crime conceived and planned by plaintiff in error; but on the other hand, it is plainly beyond any question of a doubt that none of the utterances charged against plaintiff in error would have been made but for the activities of these men. Surely a sound public policy requires that the Court deny the criminality of the plaintiff in error thus incited and provoked to give expression to the utterances charged against him, particularly when the utterances, after all, could by no possibility have produced any of the results which the statute is designed to prevent.

Inadmissible Collateral Statements.

As before mentioned, the Court allowed the Government to introduce in evidence for the purpose of showing intent, statements claimed to have been made by defendant at other times. (Specification of Errors XI., XII., XIII., XIV.) The alleged statements or their substance appear at pp. 40-43 of this brief. The acts made crimes by the Espionage Act are crimes only when the United States is at war. The war involved here is that between the United States and Germany. Judicial notice is taken that the World War commenced in August, 1914 and that in the United States scarcely any one supposed

it was possible for the United States to be drawn into the war until after it had been in progress more than two years. As between Germany and the Allies, many thousands of our citizens were pro-German, who when the United States entered the war eagerly took a patriotic stand against Germany and did their utmost to defeat her. Among these were the scores of Schmidts and Schultzes and Zimmermans and other German names that appeared in the long casualty lists of American soldiers.

The rule of evidence applied by this Court in the case of Rhuberg vs. United States (255 Fed. 865), is not questioned by plaintiff in error, but it is urged that the application of the rule and the admission under it of the testimony of the witnesses Cerrano and McKinnon was error which greatly prejudiced plaintiff in error upon the trial. The statements of these witnesses admitted in evidence tended to produce in the minds of the jury the idea that plaintiff in error harbored a brutal, bloodthirsty hatred of England and France, without havany any tendency whatever to establish in the least degree his attitude as between Germany and the United States in the war between them which began from one and one-half to two and one-half years after the alleged statements. The rule that other similar crimes or other similar acts are admissible to prove intent is not disputed. It is equally the rule, however, that such other similar crimes or similar acts must have some relation to the main

fact under consideration and have a legitimate tendency to establish the intent sought to be established, and must not be too remote. That they are similar is not sufficient, but the rule is that if they are relevant and material they are not inadmissible because they tend to show other offenses or tend to bring a defendant into disrepute. They are, however, inadmissible if their only result is to bring defendant into disrepute without having any tendency to establish the intent in question, and that is the situation here. The witness McKinnon was permitted to testify that plaintiff in error in a casual conversation in San Francisco had in the fall of 1915, said that "before we get through with them we will kill every man, woman and child in England." And the witness Cerrano was allowed to testify that plaintiff in error in 1914 said, "France and England come easy," and also muttered to himself, "One Kaiser and one God."

The testimony of these witnesses is highly improbable, and besides has not the remotest tendency to show that plaintiff in error favored the cause of Germany in the war with the United States entered into long thereafter as the result of disputes and controversies likewise arising long thereafter.

In the case of Hall vs. United States (256 Fed. 748), the Court had under consideration the admission in evidence of threats alleged to have been made by the defendant against the President of the United States. The case was one arising under the Espionage Act, and the indictment contained four

counts. Judge Pritchard, speaking for the Court, said:

"The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country. The Circuit Court of Appeals for the First Circuit in the case of Thompson vs. United States, 144 Fed. 16, 75 C. C. A. 174, said:

'There is no occasion to question the general rule which excludes all evidence of collateral offenses. Such rule is often called the 'Rule of Logic,' because it is based upon the idea that evidence of the commission of one crime in and of itself has no legitimate tendency to prove the commission of another crime. This general rule in practice is, of course, more absolute when the offenses are of a different nature.'

"In the case of People vs. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court said:

'This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the

birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.'

"If this were not the rule, ther would be no guaranty for the life or liberty of the individual, and this would be especially true in time of war, as in this instance, when the government is involved, or on other occasions when public sentiment might be aroused as to a particular question."

If plaintiff in error made the statements testified to by the witnesses McKinnon and Cerrano, it is absolutely certain that the United States was not and could not have been in his mind. The intent sought to be established here has relation to the military measures of the United States against Germany, or the military measures of Germany against the United States, and no evidence is competent to establish that intent except evidence that has a legitimate tendency to show the same. At the time it is claimed plaintiff in error made the statements, no military measures as between the United States and Germany existed and none were in contemplation. Statements that are relied upon to establish intent must themselves disclose the intent it is sought to establish. (United States vs. Denson, Bulletin No. 142; United States vs. Schulze, 253 Fed. 377,

378; quoting Stephens Digest of the Law of Evidence.) Otherwise, evidence of the statements offered are irrelevant and immaterial to the issue. That is the reason of the rule that evidence of other crimes is not admissible to establish the charge of a specific crime; and likewise of the exception to that rule, that evidence of other acts having a tendency to establish the intent essential to the specific crime is admissible, notwithstanding it may show the accused committed other offenses. After all, the admissibility of evidence of collateral acts, whether they involve crime or not, is determined by the elementary rule of evidence that the same must be relevant. The rule is stated in Jones on Evidence in Sections 137 and 138:

> "The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.
>
> "Where there is such legitimate connection between the fact offered as evidence and the issuable fact that proof of the former tends to make the latter more probable or improbable, testimony proposed is relevant if not too remote."

Here the issue was the intent of plaintiff in error to materially aid Germany and materially hinder the United States in the war. Statements of plaintiff in error hostile to England or to England

and France in 1914 and 1915 would have no logical or visible tendency to prove that issue, and that is all the statements in question amounted to. If the defendant had been on trial for burglary, evidence that he beat and robbed a man at another time would not be admissible; yet, such evidence would have just as much tendency to establish guilt of the offense charged as the evidence of Cerrano and McKinnon did here. The dictates of justice and fairness required in this case, and in fact in all cases under the Espionage Act, that the rules of criminal evidence be strictly adhered to. The minds of people were inflamed by the stress of war, and the slightest evidence to the discredit of an accused was bound to be weighed heavily against him. All text-writers and all courts that have had occasion to consider the matter admonish the exercise of great caution in permitting the introduction of evidence of other crimes because of the tendency of such evidence to discredit and prejudice an accused person in the minds of the jury, resulting in undeserved conviction. Accordingly, the tendency of such evidence to prove the issue should be clear to render the evidence admissible. The universal caution referred to should have been applied in this case. While the evidence offered did not disclose the commission of another crime, it had all the tendencies of evidence of other crimes to discredit, injure and prejudice plaintiff in error. It pictured him to the jury as a bloodthirsty brute, exulting in the contemplated murder of the women and children of

England and France. It would be difficult to conceive of evidence more injurious and prejudicial in a case of this sort, and which at the same time was absolutely without probative force in the issue involved. There is a clear distinction between the evidence approved by this Court in the Rhuberg case and the evidence here complained of. In the Rhuberg case, although the collateral statements were made before the United States entered the war, they were made at a time when it was obvious that war would result between Germany and the United States, and at a time when the most bitter differences existed between the two countries. The statements were made at a time when an issue existed between the United States and Germany, and when men had occasion to take sides upon the issue and express their favor for one or the other of the two countries. Under those circumstances the evidence of collateral statements might have had some logical and visible tendency to establish the intent in question; but in this case the alleged statements were made at a time when there was no issue between the two countries, and when no such issue was thought probable or even possible; at a time when neither the plaintiff in error nor any other citizen of the United States was called upon to settle in his own mind the merit of any such issue or to take a position respecting the same. Hundreds of thousands of citizens of the United States who at the time these statements were made had a leaning toward Germany, immediately upon the occa-

sion of such an issue arising took the side of the United States and opposed Germany. No intent that the Government was required to prove, or any attitude or bent of mind, disclosing such an intent could have existed at the time the utterances were alleged to have been made; nor could such an intent have arisen until two or more years thereafter. The attitude of mind of plaintiff in error as between the United States and Germany concerning the war was material upon the issue of intent, and certainly that could not be established by evidence of the acts or statements of plaintiff in error made years before the circumstances occurred or the opportunity arose making it possible or necessary for plaintiff in error to adopt a mental attitude respecting the question. The evidence was clearly immaterial and irrelevant and highly prejudicial and injurious.

Statements in German Language Not Admissible to Prove Charge—Variance.

Error is assigned, based upon the admission in evidence of the testimony of the witness E. C. Bendixen, and also upon the instruction of the Court to the jury upon the admission of said testimony and the refusal of the Court to grant the request of plaintiff in error to direct the jury to disregard the testimony of Bendixen. (Specification of Errors X., XXIII.) The indictment sets out the statements complained of as having been made in the English language. It appeared that all of the statements

made by plaintiff in error to the witness Bendixen were made in the German language, and that Bendixen addressed plaintiff in error altogether in the German language, and that none of the other persons present understood the German language. Counsel for plaintiff in error objected to the introduction of the testimony of Bendixen because such testimony constituted a variance from the charge in the indictment and did not tend to prove any of the charges therein. That the testimony of Bendixen was inadmissible is sustained by all the authorities. That its admission was highly prejudicial is conclusively determined by the testimony itself. The rules of criminal pleading respecting the evidence admissible to prove the charge are precisely the same in all respects in espionage cases as in other criminal cases. Where a libel or a slander, or a seditious libel or slander, is uttered or published in a foreign language, the fact must be pleaded before evidence of the speaking or writing of the words is admissible. All of the text-writers, and all the decisions upon the question state the rule substantially thus:

> "Where the words are spoken in a foreign language the original words should be set out in the declaration and an exact translation should be added. In the case of slander an averment was formerly required to the effect that those who were present understood that language; and though such averment is no longer necessary the fact must still be proved at the trial, for if

words be spoken in a tongue altogether unknown to the hearers no action lies. * * Giving a translation without the original or the original without a translation, is not sufficient." (Newell on Slander and Libel, 3d Ed., Sections 325, 768. Odgers on Libel and Slander, 4th Ed., pages 119, 580. Bishop's Directions and Forms, Sec. 619, note at page 358, where an approved form is set out. Townshend on Libel and Slander, 4th Ed., Sections 96, 330. 1 Bishop's New Criminal Procedure, Sec. 564.)

Notice will be taken of some of the decisions.

In Stichtd vs. State (25 Texas Appeals 420; 8 Am. St. Rep. 444), the Court said:

"A novel question is presented in the record. In the information the alleged slanderous words are set forth in the English language. On the trial, over the objections of the defendant, the state was permitted to prove slanderous words uttered by the defendant in the German language, said words when interpreted meaning substantially the same as the slanderous words set forth in the information. The question presented is, when oral slander is alleged to have been committed by the use of the English language, can such slander committed by the use of the German language be proved, there being no allegation that the slander was uttered in the German language? We are of the opinion that the question must be answered in the negative.

In a civil action for slander, the rule is, that where the slanderous words were spoken in a foreign language, they must be set forth, together with a translation into English. To set forth the foreign words alone will not be sufficient. And to allege a publication of English words, and prove a publication of words in another tongue, is a variance: Townshend on Slander, Sec. 330.

"The reasons upon which the above stated rule is founded demand its application with equal if not of greater force in a criminal than in a civil prosecution for slander. In all criminal prosecutions the accused party has the right to be informed by the information or the indictment of the facts charged against him, so that he may prepare to meet them, and he can only be required on the trial to meet and defend against the exact matter charged against him. The allegation and the proof must meet, and substantially correspond, otherwise the accused might be convicted of a different offense than that with which he is charged, and which he had not been informed he was called upon to meet. To charge a person with uttering slanderous words in the English language certainly does not inform him that he will be required to meet and defend against words uttered by him in a different language. We hold that the court erred in permitting the state to prove the words uttered by the defendant in the German language, and

that the slander as charged in the information is materially variant from that proved."

In the case of Romano vs. DeVito, (191 Mass. 457, 6 Am. & Eng. Anno. Cases 731), the Court said:

"There is no doubt that when libelous words are written in a foreign language they should be set out in that language and a translation given. (Zenobio vs. Axtel, 6 Tr. 162, per Lord Kenyon, Chief Justice.) The same rule applies in the case of slander (Citing cases.) It is also necessary to prove that the translation of the foreign words in the declaration is correct. (Citing cases.) As there was no attempt to do this in the case at bar, the ruling of the judge below was right."

Wormouth vs. Cramer (3 Wend. (N. Y.) 394, 20 Am. Dec. 706) was a slander case. The words were set forth in the declaration in the English language. They were proved to have been spoken in the German language. The lower court granted a non-suit because of a variance between the pleading and the proof. Chief Justice Savage, speaking for the Court, said:

"The rule is that words proved must be proved as laid; that is, substantially so, and it is not enough to prove words of similar import. How can this rule be complied with when words are laid in one language and proved in another? This is emphatically proving words of similar import. The judge at the circuit was correct in

non-suiting plaintiff for a variance. The cases cited by defendant's counsel show that the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English and that they were understood by those who heard them. (Starkie on Slander, 85, 308.) This was done in the case of Demarest vs. Haring, 6 Cowen 76, though no question on that point arose in that case."

Zeig vs. Ort (3 Pinney (Wis.) 30) was an action for slander. On the trial it appeared that the words charged in the declaration were spoken in the German language. The declaration set forth the words in English. It was proved that the words spoken by the defendant were understood by the persons who were present at the time they were uttered. A motion for a non-suit on the ground of variance was overruled. In an opinion by Justice Jackson the Court said:

"Two questions arise in this cause. First: Was there a material variance between the plaintiff's declaration and his proofs? Second: Was the declaration itself substantially defective? Both of these points must be settled by the weight of authority:

"First as to the question of variance. On this point there can be no question that since the leading case of Zenobio vs. Axtel, 6 Term 162, the uniform current of authority has been that where the slanderous words were spoken in a

foreign language they should be set out in the declaration in the original language with an English translation showing their application to the plaintiff. 1 Starkie on Slander, 324; 2 Phillips' Evidence 236; Wormouth vs. Cramer, 3 Wend. 394. * * In the case at bar the slanderous words alleged to have been spoken were set forth in the declaration in the English language. It was proven by all the witnesses on the trial on the circuit that the words were spoken in the German language. Here, according to the authorities which we have cited, was a fatal varience between the declaration and the proofs * *

"Second: Is the declaration defective in not averring that those who heard the slanderous words understood them? We have no doubt that such an averment is necessary where the words are spoken in a foreign language."

Schultz vs. Sohrt (201 Ill. App. 74) was an action for slander. The Court said:

"If the allegations and proofs do not substantially correspond, there is a fatal variance and the plaintiff must fail. 13 Enc. Pl. & Pr. 62. A verdict will not aid a count failing to set forth the words spoken. 25 Cyc. 472. There would be a fatal variance between the words alleged in English and proof of words spoken in German. On the second proposition we cannot see how a judgment recovered for slander for words spok-

en in English could be a bar to damages for words spoken in German."

Kerschbaugher vs. Slusser (12 Ind. 453) was an action for slander. The Court said:

> "Where the words were uttered in a foreign language the averment should be in accordance with the fact, setting forth the words in that language together with a translation thereof. If they are alleged as having been spoken in the English language, it will be a variance if the proof is that they were spoken in a foreign language. 3 Phillips' Evidence, page 551."

In the last case the Court in discussing the pleading further said: "There is nothing in the complaint by averment or otherwise that the words were spoken in any language other than the English."

State vs. Marlier (46 Mo. App. 233) was a criminal case wherein the defendant was indicted, charged with slander. The Court in reversing the case for failure of the lower court to sustain a motion in arrest of judgment, said:

> "The defendants are Belgians and it appears that the words were spoken in the French language in the presence and hearing of the Belgians. The case was tried by the aid of an interpreter. The indictment sets out the words in the English language, and omits to set them out in the language in which they were uttered. This was wrong. The words should be charged as spoken and in the tongue spoken. They should

then be followed by a proper translation. Zennobis vs. Axtel, 6 Tr. 162; Warmouth vs. Cramer, 3 Wend. 394; Kerschbaugher vs. Slusser, 12 Ind. 453; Hickley vs. Grosjean, 6 Blackford 351; Odgers Libel and Slander, 109, 110, 470; Newell on Defamation, Slander and Libel, 277, 637. And in this respect there is no difference between a civil and criminal prosecution. Cook vs. Cox, 3 M. & S. 110. The motion in arrest should have been sustained."

Kunz vs Hartwig (151 Mo. App. 94) was an action for slander. The Court applied the rules of pleading and of evidence approved by the court in the case of State vs. Marlier, supra. In its opinion the Court said:

"In actions of libel and slander where the defamatory words charged in the petition are written or spoken in a foreign language, the rule of pleading is that they must be set forth in the petition together with a proper translation of them. If the pleading alleges the words were spoken in the English language and the evidence shows that they were spoken in a foreign language, the variance is fatal. State vs. Marlier, 46 Mo. App. 233; 3 Enc. Pl. & Pr. 102."

In the case of Heeney vs. Kilbane (59 Ohio St. 499), in an action for slander, it was held that a charge that if the words were spoken in a foreign language there can be no recovery under a petition setting out slanderous words in the English language was correct. The Court said:

> "The words are set out in the petition in the English language. * * This is an English-speaking nation, and our courts and schools use that language, and the natural presumption is that English was used until the contrary is made to appear."

Zenobio vs. Axtel (6 Term 162, 9 Eng. Rul. Cases 87) was an action for libel. A motion in arrest of judgment was interposed on the ground that the original paper as written in the French language should have been set out in the count. Lord Kenyon, Chief Justice, said:

> "It is unnecessary to argue the other points if this objection be fatal; and that this objection must prevail is evident from the uniform current of precedents in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them showing their application to him."

In the case of Cook vs. Cox, (3 Maul & Selwyn 110, 117; 9 Eng. Rul. Cases 89), Lord Ellenborough, Chief Justice, expressly approved the rule of pleading and of evidence announced or established by Lord Kenyon in the case of Zenobio vs. Axtel, supra. Lord Ellenborough further said: "There must be no reason for any difference in this respect between civil and criminal cases."

On the trial of plaintiff in error the Court entirely lost sight of the rule of pleading requiring an appropriate charge or allegation to sustain the

admission of evidence. This is manifest from the instruction which the Court gave the jury at the time the evidence was offered. The Court said:

> "Now I cannot conceive that it was intended by this statute that the false reports should be made in any certain language. It may be made in English; it may be made in German; it may be made in Italian; but whatsoever language it is made in, it is false reports that come within the statute. * * The Government has tried to prove that that statute has been breached by words, and it is trying to prove now that the words were spoken in the German language, and it seems to me that the statute can be breached by the German language as well as by the English or Italian or any other language."

The Court made further observations of like import.

The Court was entirely correct in saying that the statute might be violated by the use of a foreign language accompanied by the essential intent, and that such violation might have been shown by evidence that a foreign language was used; but the Court entirely lost sight of the indispensable requirement that before such proof could be offered there must have been a pleading—in this case an indictment, setting forth that the violation occurred by the use of a foreign language, and setting forth the foreign words used together with a translation of their meaning into the English language. It

was not a question here of whether the statute could be violated by the use of a foreign language. The question was one of pleading and notice to the accused by a proper pleading of the offense he was required to meet. The pleading was insufficient to authorize the admission of the evidence under all the authorities. Before testimony that the utterances attributed to plaintiff in error could be introduced, the Government was bound to plead that they were made in a foreign language, and set forth a proper translation thereof in the English language, and before the evidence could be submitted to the jury the Government was further required to prove that the persons present understood the foreign language used. If all of the utterances of the plaintiff in error had been made in German and nobody present understood them, necessarily no offense was committed by him. The testimony of Bendixen was clearly variant from the charges in the indictment and inadmissible. It was clearly prejudicial. The Court was in error in admitting the testimony also in his observations as to the competency, materiality and relevancy thereof made before the jury. The Court also erred in denying the request of plaintiff in error to take said testimony away from the jury after the same had been admitted.

Intoxication Producing Reasonable Doubt of Capacity to Form Intent Justifies Acquittal.

Plaintiff in error requested the Court to instruct the jury as follows:

"If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

"While voluntary intoxication is no excuse or palliation for any crime actually committed, yet upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such inability and lack of intent was the result of intoxication." (Specification of Error XX.)

The foregoing request was designed to guard the jury against an impression they might have that it was incumbent upon the plaintiff in error to satisfy them that he was so drunk at the time of making the utterances charged against him that he was

unable to form the criminal intent which was an element of the charge or charges against him; and further to clearly advise the jury that the burden was upon the Government to establish to their satisfaction beyond a reasonable doubt that plaintiff in error had the capacity to form the essential criminal intent, and that he had such intent at the time in question. In the case of Davis vs. United States (160 U. S., 469, 487), the Court said:

> "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crimes for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."

Again, the Supreme Court in the case of Hotema vs. United States (188 U. S., 413), expressly approved the following instruction:

> "The burden is upon the Government throughout the entire case to prove every essential element of the case charged; and if you should have a reasonable doubt, taking into consideration all the evidence in the case, that the defendant Hotema was sane at the time of the commission of the act charged, you will acquit him."

The cases above cited and those cited in XIII Points and Authorities in this brief, it is true, are cases where the defense of insanity was interposed

by the defendant. However, the rule requiring the Government to prove every essential element of a criminal case to the satisfaction of the jury beyond a reasonable doubt prevails in every case regardless of the offense charged or the defense of the accused thereto. The burden was upon the Government in this case to prove to the satisfaction of the jury that ~~undisputed intoxication of plaintiff in error did not~~ the undisputed intoxication of plaintiff in error did not incapacitate him from forming the criminal intent required for conviction. Instead of giving the instruction requested, the Court directed the jury as follows:

> "Intent is an essential element in the perpetration of each of the four offenses charged against the defendant in these first four counts of the indictment. If the intent is absent, the defendant cannot be held accountable for what he is alleged to have done. Drunkenness is no excuse for the commission of a criminal offense, yet while this is the law, it is also the law that, where a specific intent is necessary to be proved before a conviction can be had, **it is competent to show that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. In other words, it is a proper defense to show that the accused was intoxicated to such a degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged.**
>
> "I therefore instruct you, gentlemen of the

jury, that, if the defendant was intoxicated at the time of making any of these statements which are set forth in Counts one, two, three and four, to such an extent that he could not deliberate upon or understand what he said, or form an intention to say what he did, your verdict should be not guilty. Otherwise, such a conclusion would not necessarily follow.

"This, as I have indicated, pertains to the first four counts in the indictment.

"It is common knowledge, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending to utter the things that he is pleased to speak. And, as I have advised you, evidence of drunkenness is admissible solely with reference to the question of intent. **The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully examined** in connection with all the circumstances in evidence in the case.

"You should discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent and purpose, and such a prostration of the faculties as renders a man incapable of forming an intent. If the intoxicated person has the capacity to form the intent, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was too intoxi-

cated to conceive it readily by reason of his intoxication.

"You have heard the testimony relating to the defendant's alleged intoxication at the time, and you should consider the whole of it bearing upon the subject, coming from whatsoever source, and determine for yourselves the extent of the defendant's intoxication, if you find that he was intoxicated, and to what extent, if at all, it impaired his faculties, whether to the extent of rendering him wholly incapable of forming an intent, or whether his faculties were still left in such a condition as that he was yet able to think and reason, and to form a design of his own to do things upon his own account. If he was, then he would be amenable." (299-301.)

The Court will recall that the testimony of the intoxication of plaintiff in error came largely from the Government's witnesses, and that the extent thereof and his irresponsibility therefrom are plainly inferable from the nature of the utterances of plaintiff in error testified to by the Government's witnesses. It therefore became incumbent upon the Government, at the very outset of its case, to remove all reasonable doubt from the jury's mind that such intoxication deprived plaintiff in error of the capacity to form the required intent. This burden remained with the Government throughout the trial. The instruction given by the Court conveyed the erroneous direction that the burden was upon plaintiff in error to satisfy the jury that by reason of

his intoxication he was wholly incapable of forming the intent which it was the duty of the Government to prove beyond a reasonable doubt; and further, that the evidence in the case showing the extent of his intoxication and his want of capacity as a result thereof "should be received with great caution and carefully examined in conection with all the circumstances and evidence in the case." This direction by the Court relieved the Government of the burden of showing that plaintiff in error was capable of and did form the prohibited intents notwithstanding his intoxication. It improperly cast upon plaintiff in error the burden of showing he was wholly incapable of forming the specific intents, and heavily discounted the evidence in the case calculated to discharge that burden. There is no rule of law which requires the evidence and circumstances of a case tending to show lack of intent as a result of intoxication to be received or weighed or examined in any different manner than any other evidence and circumstances in a case. The direction of the Court to the jury that they should receive with great caution and carefully examine such evidence in this case was equivalent to telling the jury to view the evidence which showed absence of intent with suspicion and to give it scant weight. Some of the State courts cast the burden of proving defenses like insanity and intoxication upon the defendant, and some States—Oregon, for instance have statutes establishing such a rule; but that is not the rule in the Federal courts, as is clearly es-

tablished by the leading case of Davis vs. United States (160 U. S. 469, 487). Nowhere in the instructions did the Court direct the jury to the effect that if the intoxication of plaintiff in error created or raised a reasonable doubt in their minds as to the capacity of plaintiff in error to form the intent essential to conviction they should acquit him. Plaintiff in error was entitled to such an instruction as a matter of right, and it was error to refuse the same; the error was emphasized and aggravated by admonishing the jury to exercise great caution in receiving and weighing the evidence pertaining to the question of intoxication and its bearing upon the question of intent. The evidence could scarcely fail to raise a reasonable doubt in the mind of any ordinary man respecting the capacity of plaintiff in error at the time to form the prohibited criminal intent. Had the jury been directed that the presence of such a doubt in their minds required an acquittal, a different verdict might have resulted.

Criminal Intent Cannot be Found From Words Spoken Unless Such Intent is the Necessary and Legitimate Consequence Thereof.

Plaintiff in error requested the Court to instruct the jury as follows:

> "The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such

statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute." (Specification of Error XVIII.)

"While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inferences than to find any other fact without evidence." (Specification of Error XIX.)

In the case of Von Bank vs. United States (253 Fed. 641), the Court said:

"Every man is presumed to intend the necessary and legitimate consequences of what he knowingly does or says. The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken."

This is the rule established by all the cases. It was important in this case that the rule mentioned be brought clearly to the attention of the jury, as it is extremely doubtful whether any of the utterances charged against plaintiff in error could by

any possibility produce any of the results prohibited by the statute, or were sufficient by the most strained construction to show any of the criminal intents referred to in the statute, even though the words had been spoken by a sober man in the presence of persons disposed to be friendly towards him. If this assumption is correct, the jury had no right to find that the words spoken established the necessary intent, and plaintiff in error was rightfully entitled to have the jury so directed. In the Von Bank case the Court further said:

> "A jury has no more right to draw an inference from words that do not necessarily and legitimately authorize such inference, that to find any other fact without the evidence."

In the case of Schenck vs. United States (249 U. S. 47, 39 Sup. Ct. 247; 63 L. Ed. ——; March 3, 1919), the Court said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The Court in the case at bar instructed the jury as follows:

> "In a case of this character, the jury may find from the facts and the circumstances, together with the language used, the intent, even though the intent was not expressed—directly

expressed. In other wards, you may infer the intent from the character and the natural, ordinary, necessary consequences of the acts." (Printed Transcript of Record, page 303.)

This instruction was incomplete in that it did not present to the jury the contention of plaintiff in error respecting the same matter. To properly and fully present the case and protect the rights of plaintiff in error therein, the Court should have added to his instruction at least the following portion of the request of plaintiff in error:

> "But the jury has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inferences than to find any other fact without evidence."

By the refusal of the Court to give the requested instructions just mentioned, the jury was deprived of a view and aspect of the evidence which plaintiff in error had a right to have them consider, presumably to the substantial prejudice of plaintiff in error.

A different verdict might have resulted if the jury had clearly understood that they could not infer criminal intent from the absurd babblings of plaintiff in error that, under the circumstances, could not possibly have had any of the consequences aimed at by the statute.

Words Spoken in Sudden Anger and Without Deliberation Do Not Violate the Act.

The evidence showed that plaintiff in error was in an angry frame of mind when expressing himself. The nature of his utterances—including those profane in character, clearly show that his hearers were aggressively engaged in promoting his anger. That the jury might be reminded that utterances made in sudden anger or hastily as the result of aggressive heckling do not violate the statute, plaintiff in error requested the following instruction:

> "If the jury find that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4." (Specification of Error XXI).

It is the duty of the trial court when seasonably requested to give to the jury appropriate instructions presenting for their consideration and guidance the rules of law applicable to the reasonable inferences and conclusions favorable to the accused which may be drawn from the evidence. Strict observance of this rule is indispensable to the protection of the liberty and rights of one accused of violation of the Espionage Act. During the war and at the time plaintiff in error was tried, an accusation was a long step towards conviction. That this was so was but natural. Yet, it emphasizes the ne-

cessity that every rule provided by law for safeguarding the rights of an accused be observed by the courts for his protection. General instructions defining the word "wilful" and the term "reasonable doubt" do not meet the requirement that the case of the accused be presented to the jury. It is the law that words uttered in sudden anger and without deliberation and utterances made hastily as the result of heckling do not violate the Espionage Act (United States vs. Krafft, 249 Fed. 919; United States vs. Dodge, Bulletin No. 202). The evidence was at least susceptible to the inference, if it did not conclusively show, as contended by plaintiff in error, that he was heckled and provoked into making the statements charged against him, and that they were made in anger and without deliberation. If the evidence had the effect indicated, it constituted a complete defense for plaintiff in error, and the jury should have been directed accordingly. The request under discussion was designed to advise the jury of one of the defenses in the case, and no general instructions not directed to that particular defense could take the place of it or avoid the error arising out of its refusal.

Count 4 Defective—Clauses of Statute Violate Constitution.

Count 4 of the indictment is predicated upon those clauses of the Espionage Act, as amended May 16, 1918, which provide as follows:

"Whoever shall by word or act support or favor the cause of any county with which the United States is at war, or

.. .. .. by word or act oppose the cause of the United States therein, shall be punished," etc.

These clauses of the statute are calculated to completely suppress discussion, the exchange of ideas or opinions, and the expression of differences respecting the progress or the outcome of this or any other war or the respective merits of the parties thereto. This enactment marks the extreme to which Congress has gone in setting aside the privilege of the citizen secured by the Constitution to freely express his opinions regarding matters of general public concern. It goes beyond any legislative provision yet upheld by the Supreme Court as within the power of Congress to enact legislation for war purposes. Some of the decisions go so far as to indicate that in time of war Congress has power to enact any provision which in its judgment is expedient or required to promote the success of the United States in the war. The indicated power is based upon the right of national self-defense, which, it is intimated, for the time supersedes all individual rights. This implied power, however, is insufficient to uphold the portion of the Espionage Act under discussion. There was at the time of this enactment no danger present or remote which threatened the United States as a government, or in any way endangered its territorial or other integrity. We were engaged in war on foreign soil.

There was in view not the remotest prospect that the integrity of the United States could be affected by the result of the war, nor its territorial extent and position disturbed in the slightest. If such a power may be exerted at all, surely its exercise can be called into action only when the national safety is actually threatened, and then the statute, it would seem, must be limited to the emergency it was adopted to meet. There is no authority in the Constitution, either express or implied, empowering Congress to suspend the guaranties of personal rights found in that instrument. The Supreme Court of the United States in the case of Ex parte Milligan (4 Wall. (U. S.) 2, page 120), said:

> "The Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."

While the powers of Congress to provide for conducting war are very large, yet they must be exercised in a manner to preserve all the individual rights secured and guaranteed by the Constitution. The exercise of a war power in a struggle against an enemy in a manner that violates rights guaranteed by the Constitution cannot be tolerated. Other-

wise, we may destroy ourselves while engaged in the attempt to vanquish our enemies. Whenever the situation arises that the ordinary powers of Congress cannot be exercised without impairing rights guaranteed to the citizen, the remedy is martial law, provided for by the Constitution to be exerted temporarily, and not the adoption of legislation which suspends or conflicts with the rights of the citizen. There is no exigency that can arise whereby Congress is authorized to provide legislation that will suspend for any length of time the rights guaranteed to the citizen by the Constitution. Congress itself is a creature of the Constitution and is bound to preserve all of the rights guaranteed by that instrument. In providing for the national self-defense, Congress must look to the Constitution for its power to employ the means to provide such self-defense. The nation in the exercise of the right of self-defense, like the individual, can only employ the means necessary to protect the right, and only when actual danger is imminent; and this Nation must exercise that right in the manner pointed out and provided by the Constitution. The Constitution does not authorize the adoption of statutes impairing and abridging personal rights as a means of providing national self-defense. If it be conceded that the power of self-defense may be exercised by Congress in the form of legislation having the effect of suspending individual or other rights secured by the Constitution, necessarily such legislation is limited to the adoption of special acts directed and con-

fined to a particular and immediate danger to the life of the Nation. The Espionage Act is not a special enactment, and no danger existed sufficiently serious or threatening to call into action any power upon which the above quoted provisions of the statute can be sustained. The statute is not confined to war with Germany, but applies to any war and for all time unless repealed. It applies to all future wars in which the United States may be engaged, whether with the most powerful enemy or with the weakest, whether for benevolent or high moral purposes or for aggression. If the statute is valid now it will be in the future, and will prevent discussion then as well as now regardless of the absence of danger or the possible national need of such discussion. The enactment does not square with the national character of the United States, or with the rights and immunities secured to its citizens by the Constitution. Under it the citizen in time of war may still differ with the Government mentally, but he cannot give intentional expression to his differences. It is only another step to inquisition and punishment for holding unexpressed opinions. It is submitted that the power asserted by the clauses of the statute referred to should be denied, as in effect was done by the Supreme Court in the case of Ex parte Milligan (4 Wall. (U. S.) page 2). It clearly violates the first amendment to the Constitution.

Counts 3 and 4 Defective—Charge Insufficient.

The very drastic character of the clauses of the

statute on which Count 4 of the indictment is based, and its broad and indefinite terms, necessitate resort to construction respecting the nature and quality of the expressions which may constitute its violation. It is a highly penal statute and demands a strict interpretation in the interest of the accused. The verbal acts aimed at by the statute naturally and perhaps necessarily contemplate only speeches, addresses, arguments, writings and the like deliberately made or circulated. A statute so all-embracing, not to say vicious, as the provisions under discussion, can hardly be properly construed to cover disconnected words and sentences or chance utterances blurted out without studied purpose. An examination of the indictment discloses that the words or statements plaintiff in error was accused of uttering do not constitute the character of utterances at which the statute was aimed. The utterances are wholly disconnected; most of them are without any clear meaning, and none of them have any capacity to support or vindicate the cause of the enemy or to constitute opposition to the United States. They do not in any sense arise to the dignity of debate or agitation, as charged in the indictment. They are charged to have been made upon a railroad train, and no showing is made and none could be made of the manner in which they could accomplish any of the things denounced by the statute. Consequently, Count 4 of the indictment does not state facts sufficient to constitute a crime.

The fourth count of the indictment charges that defendant, by making the alleged statements to and in the presence of the persons mentioned,

> "did by **word support and favor** the cause of a country with which the United States was then and is now at war, to wit, the Imperial German Government, **and oppose** the cause of the United States therein."

The charge sets forth two distinct and separate offenses in one count of the indictment, and is bad for duplicity. The clause of the statute provides:

> "Whoever shall by word or act support or favor the cause of any country with which the United States is at war or
>
> . . . . by word or act oppose the cause of the United States therein."

Here we have defined two distinct and separate offenses. The pleader proceeded upon the assumption that to support and favor an enemy by word necessarily at the same time opposed the cause of the United States; that to support and favor the enemy was but one step in an offense that was completed by opposing the United States. Some color might be given to the assumption if the statute had provided that whoever shall by word or act support or favor the cause of any country with which the United States is at war or oppose the cause of the United States therein. The statute then would have connected the crime of opposing the cause of the United States with the commission of the act consti-

tuting the offense. As the statute reads, however, a distinct separation is made between the acts which constitute the one crime and those which constitute the other. Most of the other offenses defined by the statute are aimed at specific physical results to flow from words used or statements made, and where a number of results are mentioned they are related to each other and are but successive stages in the progress of a criminal enterprise constituting as a whole but one offense, though either when done is an offense. That is not so with the clause under discussion. It aims at intentional support or favor of the cause of the enemy general in character and manifested by the use of language, and to intentional opposition to the cause of the United States likewise manifested. The statute is directed at affirmative utterances which directly support or vindicate the cause of the enemy, and at affirmative expressions in direct opposition to the cause of the United States in the war. The indirect inferences to be drawn from utterances and things not directly expressed therein, cannot form the basis of an indictment under these provisions. Neither crime defined is a part or element of the other. They are entirely separate and distinct. If a person intentionally and purposely uses words, some of which affirmatively express support and favor of the enemy cause, and some of which affirmatively oppose the United States in the war, two offenses are committed; the pleader cannot set them out as one offense of supporting and favoring the enemy and

opposing the United States. The pleader can set out the words and charge that the accused thereby supported and favored the cause of the enemy, in which case he must rely upon the clause of the statute pleaded; or he can charge that the accused thereby opposed the United States, where he must rely upon the clause of the statute pleaded. Or the pleader can include both charges in his indictment in separate counts and obtain the benefit of both offenses in making his case. But he cannot properly include them in one count as was done in this case. The commission of two or more offenses by the same act does not warrant the inclusion of more than one of such crimes in the same count of an indictment, unless they are all grades or steps of the same offense. Where the crimes are separate and distinct they must be separately pleaded even though they arise out of the same act or concurrent acts. The demurrer of plaintiff in error to the fourth count of the indictment should have been sustained upon all the grounds set up.

The rule of criminal pleading that where the statutory definition of an offense includes generic terms or embraces acts which it was not the intention of the statute to punish, the indictment must state the species, it must descend to particulars. applies to the clause of the statute applicable t Count 3 of the indictment. (United States vs. Bopp, 230 Fed. 723.)

Neither the Espionage Act nor any other act declares what is meant by the words "resistance to

the United States," or what would be required to constitute such resistance; so that, in giving effect to the statute, the Court must determine from other sources what Congress meant when it used the words. The indictment follows the language of the statute without amplification. There is no statement that defendant intended that certain things should be done, which if accomplished would in the judgment of the pleader constitute resistance to the United States; and upon the sufficiency of which things to constitute such offense, the judgment of the Court might be exercised. The argument of the Court in the case of United States vs. Bopp (230 Fed. 723, 726) applies with full force to the situation here, and what has been said concerning the words "resistance to the United States" applies equally to the phrase "cause of its enemies" used in the same count of the indictment. The things that it is claimed plaintiff in error expected to have done, and the war measures of the enemy he sought to forward, should have been described and set forth in the indictment in order that plaintiff in error might have notice of the charge against him and to enable the Court to determine whether the things to be done would naturally promote the success of the enemy. Count 3 of the indictment therefore does not state a crime, and the demurrer thereto should have been sustained.

Inadmissible Testimony in Rebuttal.

Error is assigned because of the admission over objection of certain testimony of Eva. T. Bendixen,

a witness called by the Government in rebuttal. (Specification of Error XV.) For the purpose of impeaching the Government's witness Erwin C. Bendixen, plaintiff in error called Wesley Nippolt as a witness, who, in answer to impeaching questios propounded to him, testified as follows:

> "On or about the 10th day of October, 1918, at the home of Mr. and Mrs. Bendixen, in this city, county and state, Mr. Bendixen stated these facts to witness: "I have fixed my uncle's stock plenty. You know Fred Jacquelin. Tell Jacquelin to get rid of his stock for it won't be worth much for a very great while longer," or words to that effect. And at that time Mr. Bendixen said to witness that he considered the entrapping of Henry Albers in this case as his bit towards the war, or words to that effect. Mr. Bendixen said at that time that before he would go into the room where Henry Albers was that he had an agreement with Mr. Tichenor, Deputy Marshal, by which he could drink as much whiskey as he wanted to without being charged with any criminal offense." (158, 159.)

To rebut the evidence of the witness Wesley Nippolt, the Government upon rebuttal called Eva T. Bendixen. Counsel for the Government propounded to the witness the impeaching questions that had been asked the witness Wesley Nippolt, and she answered the same in the negative. Thereupon counsel for the Government propounded to the

witness the following question:

> "Now, what conversation was had at that time, if any, between Mr. Nippolt and Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him?"

The question was objected to by counsel for plaintiff in error on the ground that the testimony sought to be elicted was hearsay, and upon the further ground that the witness having been called to meet impeaching testimony, and having met it by her negative answers to the questions propounded, it was improper to attempt to elicit from the witness testimony in support of the Government's direct case. The Court overruled the objection and permitted the witness to testify as follows:

> "Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditious remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so; and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was interested in the firm and that his first thought was probably he should wire his uncle

and then again he thought it would bring a reflection in some way or other, that he better leave just everything alone." (249.)

This constituted an attempt to corroborate and bolster up the testimony of Erwin C. Bendixen by hearsay testimony. It would have been inadmissible if offered in the Government's case in chief, and was equally inadmissible upon rebuttal. It was in no sense rebuttal testimony, and was not competent to meet the effort that had been made to impeach the witness Erwin C. Bendixen concerning specific statements Bendixen denied he made to Wesley Nippolt, and which Wesley Nippolt testified Bendixen did make to him in the presence of Mrs. Bendixen. Ordinarily the testimony given by Mrs. Bendixen of which complaint is made, might not be important, but taken with the very prejudicial nature of Bendixen's testimony and its entire inadmissibility, which has been pointed out, it constituted grave error.

While plaintiff in error was upon the stand as a witness in his own behalf, counsel for the Government asked him if he was not prone during 1914, '15 and '16, and until the early part of 1917, to bet anybody that wanted to bet as to the outcome of the war, and whether or not he did not bet with a man named Cushing. Plaintiff in error testified:

"He never put up a cent in his life about the outcome of the war. He never bet with Cushing. He only met Cushing about once, or two or

three times a year, maybe. He didn't think he ever asked Cushing to bet with him on this question" (245).

Counsel for the Government also asked plaintiff in error whether he knew Jack Noyes, and whether he made any bets with him about the outcome of the war, and whether he did not make a bet with Noyes in the Fall of 1914 as to the date when the Germans would arrive in Paris. Plaintiff in error testified:

"He knows Jack Noyes. Never made any bets with him about the outcome of the war; no. He was pretty sure that he never made a bet with Jack Noyes. No, he didn't think—it must be way back, but he didn't remember anything about it. It is so far back that he didn't know that he ever did make a bet with Noyes in the Fall of 1914 as to the date when the Germans would arrive in Paris. He might have, he would not say. He would not say that for sure, that he did do it. If he made any bet with Noyes along that line it might have been favorable to the Germans, with a view of the Germans winning. He didn't know. If he made this bet with Noyes he didn't know whether it was after the invasion of Belgium. He didn't recollect that at all. If he made any bets with Noyes he could not remember whether they were made after Belgium was invaded in 1914. He could not remember that far back" (245-246).

With a view to impeaching plaintiff in error, the Government in rebuttal called Horace A. Cushing as a witness, who testified:

> "He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a Thousand Dollars to fifty cents and loan witness the fifty cents, that the Kaiser could lick the world" (254).

For a like purpose, the Government called Jack Noyes as a witness in rebuttal, who testified:

> "Yes, sir, as he recalled it he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of Ten Dollars that the Germans would not be in London in 60 days. Mr. Albers bet that the Germans would be in London in 60 days. Witness knows one other bet that he recalls, that was in December, 1915, that the war would be over April 1, 1916. One of these bets was paid. He didn't know which one. Both of them were for Ten Dollars. Mr. Albers lost, of course" (255).

The witness Noyes followed the witness Cushing upon the stand, and at the conclusion of the testimony of the witness Noyes, counsel for plaintiff in error moved the Court to strike out the testimony of Mr. Noyes and of the witness Cushing for the

reason that it was immaterial and an attempt to impeach upon an immaterial matter, which motion was denied by the Court. Plaintiff in error merely denied recollection of making any such bets, and therefore the attempt to impeach him concerning the same was improper. This was but a round-about way taken by the Government to bring before the jury irrelevant and prejudicial matter, and the testimony should have been stricken out upon motion therefor.

CONCLUSION.

At another time the incident out of which this case arose would have been regarded as unimportant and trivial. The words the accused was heckled into speaking while irresponsibly drunk would have occasioned merely derision and disgust. Even at the time no importance would have been attached to the matter by anyone but a Government officer and those excited by his activity and directions. Sensational newspaper stories following and based upon official version of the incident soon inflamed the public mind against plaintiff in error to such a degree that his indictment and conviction were inevitable. The imposition of a sentence so excessive and so disproportionate to the circumstances of the case violates the spirit at least of Article VIII of the Amendments to the Constitution which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." A case wherein so harsh a

penalty is inflicted for the utterance of idle disconnected words by a man far gone in drink calls for the closest scrutiny by the Court to determine whether all of the rules provided for the protection of an accused have been strictly and exactly observed in the trial, and if any of them have not been so observed the conviction should be set aside. No liberality should be indulged respecting the proceedings by which has been obtained a conviction and harsh judgment under circumstances such as this case presents. The conviction should be set aside and the cause reversed upon any one or all of the errors specified.

Respectfully submitted,

CHARLES H. CAREY,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Plaintiff in Error.

STATE OF OREGON,)
County of Multnomah,)

Due service of the foregoing Brief of Plaintiff in Error is hereby admitted this 6th day of October, 1919, by receiving a copy thereof, duly certified to as such, by John McCourt, one of the Attorneys for Plaintiff in Error.

Chas. J. Francis

Assistant United States Attorney.